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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

BERTRAM ZWEIBON, MARILYN BETMAN, IRVING CALDERON, STUART C. COHEN, SHELDON DAVIS, JEROME EISENBERG, LAWRENCE H. FINE, EILEEN GARFINKLE, RUTH HARTSTEIN, LIBBY KAHANE, MEIR KAHANE, HARRY PEARL, NEIL S. ROTHENBERG, MURRAY SCHNEIDER, ELI SCHWARTZ and ALEX STERNBERG,
Petitioners,

v.

JOHN N. MITCHELL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether decisions of this Court had "clearly established" by September 1970, January 1971, and March 1971, that it was unconstitutional and unlawful for government agents to engage in wiretapping, without antecedent judicial authorization, of a domestic organization that was not seeking to overthrow the government of the United States.

2. Whether an Attorney General who in September 1970 ignored "the advice of his legal counselors," including Solicitor General Erwin Griswold, on the meaning of this Court's decisions regarding warrantless wiretapping is entitled to qualified immunity from a suit for damages growing out of seven months of wiretapping which all eight active Circuit Judges of the Court of Appeals found to be unlawful.

3. Whether the statutory civil liability provided by the Omnibus Crime Control Act of 1968 for warrantless wiretapping applies, in general, to "national security" wiretaps conducted before the *Keith* and *Zweibon I* decisions, and in particular, to such wiretaps on the very plaintiffs who successfully established their illegality in *Zweibon I*.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 1a-28a, *infra*) is reported at 720 F.2d 162. The opinion of the district court (App. B, pp. 29a-34a, *infra*) is not reported. The original decision of the district court, granting summary judgment for the defendant, was reversed by the court of appeals. *Zweibon* v. *Mitchell* (*"Zweibon I"*), 363 F. Supp. 936 (D.D.C. 1973), *reversed,* 516 F.2d 594 (D.C. Cir. 1975) (*en banc*), *cert. denied,* 425 U.S. 944 (1976). On remand, the district court struck the plaintiffs' jury demand, but on petition for writ of mandamus the court of appeals concluded that plaintiffs were entitled to a jury trial. *In re Zweibon (*"*Zweibon II*"*),* 565 F.2d 742 (D.C.

Cir. 1977). The district court again granted summary judgment but was again reversed by the court of appeals. *Zweibon* v. *Mitchell* ("*Zweibon III*"), 444 F. Supp. 1296 (D.D.C. 1978), *reversed,* 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied,* 453 U.S. 912 (1981).

JURISDICTION

The opinion and judgment of the court of appeals were filed on October 21, 1983. On January 9, 1984, the court of appeals denied a timely petition for rehearing (App. C., p. 35a, *infra*). On March 28, 1984, Chief Justice Burger extended the time to file a petition for a writ of certiorari to June 7, 1984 (App. D, p. 36a, *infra*). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 2520 provides as follows:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—
>
> (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages; and
>
> (c) a reasonable attorney's fee and other litigation costs reasonably incurred.
>
> A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

STATEMENT

During the entire month of October 1970 and between January 4, 1971, and July 3, 1971, agents of the Federal Bureau of Investigation, acting under a specific directive from John N. Mitchell, then Attorney General of the United States, electronically eavesdropped on six telephone lines of the New York offices of the Jewish Defense League ("JDL") without securing a judicial order authorizing such surveillance. The court of appeals' majority concluded that the wiretaps were authorized by Mr. Mitchell "[a]gainst the advice of his legal counselors" (p. 3a, *infra*). This is a lawsuit for damages brought by individuals whose conversations were overheard during the wiretap.

1. This Court Decides a Number of Illegal Eavesdropping and Wiretapping Cases.

Between November 1966 and March 1969, this Court considered and ruled on a number of cases in which individuals who were defendants in criminal cases had been overheard by agents of the Federal Bureau of Investigation conducting eavesdrops or wiretaps without judicial authorization. The first was *Black* v. *United States,* 385 U.S. 26 (1966), in which the Court ordered a retrial of a criminal case after the Solicitor General disclosed, following a denial of certiorari (384 U.S. 927), that the defendant had been overheard prior to and after his indictment through a listening device installed in his hotel suite. Noting that conversations between the defendant and his attorney had been overheard (but not explicitly limiting its decision to violations of attorney-client privilege), this Court reversed the conviction and directed that a new trial be held.

On December 18, 1967, this Court decided *Katz* v. *United States,* 389 U.S. 347 (1967). The Court rejected the proposition that the Fourth Amendment protects only constitutionally protected "areas" and held that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."

389 U.S. at 353. The Court held that the eavesdropping involved in *Katz* was unlawful, even though it had been narrowly circumscribed and was confined "to the least intrusive means consistent" with the federal government's lawful end of finding evidence of criminal conduct. 389 U.S. at 356-357. Even though there was no statutory procedure by the time of the *Katz* decision under which a prior judicial warrant could be obtained for electronic surveillance of a telephone conversation, the Court held (389 U.S. at 359; footnote omitted):

> Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification . . . that is central to the Fourth Amendment," a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

In footnote 23 of its *Katz* opinion, the Court noted (389 U.S. at 358, n. 23):

> Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

Thereafter, this Court held in March 1969, that the constitutional ruling in *Katz* would be given prospective effect only, so that reversal of a conviction would result only if electronic surveillance affecting a conviction was conducted after December 18, 1967. *Desist* v. *United States,* 394 U.S. 244 (1969). Nonetheless, in March 1969, the Court held in *Alderman* v. *United States,* 394 U.S. 165 (1969), and *Giordano* v. *United States,* 394 U.S. 310 (1969), that judgments of conviction should be vacated in 18 cases, and adversary proceedings should be conducted in the district courts to determine whether warrantless electronic surveillances, during which actual or prospective defendants had been overheard, had affected the trials resulting in these convictions.

In a separate concurrence to the per curiam *Giordano* decision, Justice Stewart made the following observation (394 U.S. at 314-315; footnotes omitted):

> Finally, the Court has not in any of these cases addressed itself to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information—necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage. Mr. Justice White has elsewhere made clear his view that such surveillance does not violate the Fourth Amendment, "if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." While two members of the Court have indicated disagreement with that view, the issue remains open.

2. The Omnibus Crime Control Act of 1968 Mandates a Judicial Warrant Procedure for Electronic Surveillance.

In the meantime, following the *Katz* decision and this Court's ruling in *Berger* v. *New York*, 388 U.S. 41 (1967), Congress prescribed a procedure under which federal warrants could be obtained for electronic surveillances in certain circumstances. The law, which was signed on June 19, 1968, prohibited the unconsented interception of wire or oral communications in circumstances other than those authorized by the new federal law. *See* 18 U.S.C. § 2511. It authorized application to a federal judge for a wiretap or eavesdrop warrant to obtain evidence of a number of federal or local offenses, including espionage, sabotage, treason and violations of the Atomic Energy Act of 1954. 18 U.S.C. § 2516. The 1968 Act specified standards and established procedures for such an application and for the preservation of the fruits of any authorized electronic surveillance.

3. Attorney General Mitchell Requests and Receives Advice from His Justice Department Experts.

John N. Mitchell became Attorney General of the United States on January 20, 1969. The *Alderman* and *Giordano* decisions were issued on March 10 and 24, 1969. On April 1, 1969, J. Walter Yeagley, who had been Assistant Attorney General for the Internal Security Division for many years, sent a memorandum to the new Attorney General discussing this Court's decisions of March 24, 1969 (App. III,[1] pp. 487-491; App. E, pp. 37a-40a, *infra*). At about the same time, Erwin N. Griswold, who had been Solicitor General since October 12, 1967, sent a memorandum to the Attorney General "to consider what action should be taken by the Department of Justice in light of" this Court's decisions in the electronic eavesdropping area (App. III, pp. 492-503; App. F, pp. 41a-44a, *infra*).

Solicitor General Griswold discussed in his memorandum "whether we want to press the courts to decide whether the President acting through the Attorney General has the constitutional power to authorize wiretapping and eavesdropping without a warrant in order to protect the national security" (p. 42a, *infra*). He noted that if the issue were litigated and decided by the Court adversely to warrantless wiretapping, the President "will be faced with the choice of discontinuing all such surveillances or continuing to authorize action which the courts have declared unconstitutional" (*id.*). The Solicitor General then observed that although a decision not to litigate the issue "might" avoid the problem, it was unlikely that "the problem will go away" because "the Court would not let us hide behind a claim that it was our opinion that any surveillance that did occur was legal." Hence, he concluded, "I believe that we may as well litigate the question of the legality of national security surveillance in the pending cases" (pp. 42a-43a, *infra*). Solicitor General Griswold then continued (p. 43a, *infra;* emphasis added):

> If we determine to litigate this question, we must decide on the precise situations in which we wish to

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[1] "App. III" is the Appendix filed with the Court of Appeals in the appeal of *Zweibon III*.

> contend that the President has the power to authorize electronic surveillance to protect the national security. It could be argued that such power extends to the protection of the national security from internal subversion and, thus, the Attorney General could, without court order, constitutionally authorize electronic surveillance of the [redacted by the Department of Justice] or other subversive organizations or any officers or members of such organization. *I believe, however, that any attempt to sustain such surveillances would be disastrous. Not only would we not prevail on the particular facts presented* but I believe we would get a broad ruling that all electronic surveillance is unconstitutional if conducted without a warrant.

The Solicitor General then discussed the petition for rehearing he had filed in *United States* v. *Ivanov,* one of the cases that had been decided together with *Alderman.* (That petition had been denied on March 24, 1969. 394 U.S. 939.) He concluded that there was an overriding need to secure governmental surveillances of foreign installations against disclosure (pp. 43a-44a, *infra*); emphasis added):

> Although the disclosure of wiretapping or bugging of a domestic subversive organization might be embarrassing, we could not possibly disclose the location of our foreign intelligence surveillances. Moreover, to the extent that there is evidence that a domestic organization is engaged in serious criminal activity we could get a warrant under the Crime Control Act, but the Act does not provide the machinery for a warrant for a foreign intelligence surveillance. *Thus, I strongly urge that we claim legality only for those surveillances expressly authorized by the Attorney General to gather foreign intelligence information and to protect national defense installations and secrets from foreign espionage and sabotage.*

Mr. Yeagley had arrived, in his April 1 memorandum, at a somewhat broader standard. He acknowledged (p. 38a, *infra*):

> It seems clear that the best installations to defend, from the standpoint of legality, are those which are aimed at gathering foreign intelligence information or information necessary for the protection of national defense secrets and installations from foreign espionage and sabotage.

Nonetheless, he expressed the view that the Justice Department should defend the constitutionality of warrantless wiretapping in each of the five situations specified in 18 U.S.C. § 2511(3) (p. 39a-40a, *infra*). He then stated that there were some installations which "probably could not be justified, even under the statutory criteria." Among them he included "domestic organizations with no clear foreign attachment" (p. 40a, *infra*).

In a second memorandum (App. III, pp. 504-509; App. G, pp. 45a-50a, *infra*), Solicitor General Griswold questioned Mr. Yeagley's suggestion that warrantless wiretapping be defended in cases involving allegations of the overthrow of government "by force or other unlawful means" and protection "against any other clear and present danger to the structure or existence of the government." He expressed the view that the courts, and "particularly the Supreme Court," would not sustain such a power (p. 46a, *infra*):

> Moreover, if we attempt to sustain the power of the Attorney General to authorize electronic surveillance for purely domestic purposes, we will, in my view, prejudice our efforts to sustain the legality of electronic surveillance directed at the activities of foreign powers. Thus, as a matter of litigation strategy, it is my opinion it would be unwise for us to seek to sustain the validity of electronic surveillance directed at the [redacted by the Department of Justice] or other domestic individuals or organizations.

The Solicitor General said (p. 48a, *infra*):

> Thus, I think our chances of success are much greater if we limit our submission that the Attorney General can constitutionally authorize electronic

> surveillance to those instances where the surveillance is designed to gather foreign intelligence information. In fact, I think that we should limit our attempt to sustain the legality of such surveillance to instances involving the surveillance of a foreign establishment.

He concluded his memorandum (p. 50a, *infra*):

> Thus, my recommendation is that we litigate the question of the Attorney General's power to authorize electronic surveillance only in those cases where the surveillance was conducted at a foreign establishment in order to gather foreign intelligence information or to protect defense secrets and installations from foreign espionage and sabotage.

4. District Courts Decide Cases Concerning the "Gathering of Foreign Intelligence" and "Organizations Which Seek To Overthrow the Government."

In September 1969, the District Court for the District of Columbia ruled that warrantless wiretaps conducted between 1956 and 1961 "solely for purposes of gathering foreign intelligence information" (apparently of premises occupied by officials of the Dominican Republic) were not unconstitutional and did not violate Section 605 of the Federal Communications Act. *United States* v. *Stone,* 305 F. Supp. 75, 78 (D.D.C. 1969). At about the same time, another District Judge in the District of Columbia also held that the fact that a criminal defendant's "name had come up in connection with a wiretap on a foreign embassy" conducted between 1961 and 1963 did not require a new trial or a hearing. *United States* v. *O'Baugh,* 304 F. Supp. 767, 768 (D.D.C. 1969).

A similar ruling was issued in July 1970 by the Court of Appeals for the Fifth Circuit in a case involving a surveillance without a prior court order made "for the purpose of obtaining foreign intelligence information." *United States* v. *Clay,* 430 F.2d 165, 170 (5th Cir. 1970), *reversed on other grounds,* 403 U.S. 698 (1971). And in *United States* v. *Brown,* 317 F. Supp. 531, 536, 537 (E.D. La. 1970), *cert. denied,* 415 U.S. 960 (1974), a District Court held that another warrantless wiretap "conducted solely for the purpose of gathering foreign intelligence information" was not illegal under the Constitution or

under Section 605 of the Communications Act. Finally, in October 1970, a New Jersey District Judge held in an espionage case that warrantless electronic surveillances "expressly authorized . . . for the sole purpose of gathering foreign intelligence information" were lawful. *United States* v. *Butenko,* 318 F. Supp. 66, 69, 70-71, 73 (D.N.J. 1970), *aff'd,* 494 F.2d 593 (3d Cir.), *cert. denied,* 419 U.S. 881 (1974).

In two unreported cases decided before September 16, 1970, district courts held that warrantless electronic surveillance directed to intelligence information concerning the attempted overthrow or subversion of the government was constitutional. In *United States* v. *Dellinger,* No. 69 CR 180 (Feb. 20, 1970), the famous "Chicago Seven" case, District Judge Julius Hoffman held that "[t]he gathering of intelligence vital to the preservation of national security, whether deemed necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, or to protect the United States against a clear and present danger to the structure or the existence of its Government" may be carried out under the authority of the Attorney General without a judicial warrant. And in a brief unreported ruling by District Judge Arthur Stanley of the District of Kansas, *United States* v. *O'Neal,* No. KC-CR-1204 (Sept. 1, 1970), disclosure of wiretap records before trial was denied on the authority of only the *Clay* and *O'Baugh* cases (which had involved foreign intelligence gathering). The trial judge declared, from his review of the logs, that they related to the President's "responsibility to gather intelligence information having to do with matters vital to national security." (The ruling of the district court in *O'Neal* appears as App. H, pp. 51a-52a, *infra).*

5. Attorney General Mitchell Authorizes the JDL Wiretap.

On this state of the law—with not a single reported or unreported decision endorsing the proposition that a warrantless wiretap could be conducted on a domestic organization *not* seeking the violent overthrow of the government of the United States—Mr. Mitchell signed a request by the Director of the FBI dated September 14, 1970, for a warrantless wiretap of JDL headquarters. The FBI Director's request stated that the JDL "has demonstrated its proclivity for demonstrations and

violence by attacks on Soviet and Arab diplomatic installations in this country," and communicated a concern from "the White House" for the security of diplomats visiting the United Nations (App. III, pp. 68-69). Mr. Mitchell subsequently testified in a deposition that his "intelligence" purpose in eavesdropping on the JDL "was that appropriate measures could be taken to carry out the obligations of this Government to protect foreign diplomats and foreign nationals on our soil, and in turn, to help protect our nationals who were on foreign soil, particularly in Moscow" (App. III, pp. 40-41). He acknowledged that he had no information that the JDL was acting on behalf of a foreign power, was engaged in espionage, or was plotting the violent overthrow of the government of the United States (App. III, pp. 41-43). The initial wiretap was conducted during the entire month of October 1970.

On January 4, 1971, the FBI Director requested authorization to conduct a three-month wiretap of the JDL offices. His short memorandum again reported that JDL demonstrations "have been marked by violence" and that the demonstrations "have been the subject of numerous official protests by the Soviet Government . . . ." (App. III, pp. 70-71). The central portion of the request emphasized the "international embarrassment" resulting from JDL demonstrations:

> The renewed tensions of the Middle East situation and recent decisions by Soviet courts directed against Soviet Jews have resulted in increased demonstrations against Soviet diplomatic installations throughout the world. Demonstrations in New York City have been marked by violence with members of the JDL figuring prominently as participants therein. A surveillance of the telephone of the JDL headquarters could be expected to provide advance knowledge of activities of the group directed against anti-Jewish diplomatic establishments, which could create situations of international embarrassment to the United States. Installation of such coverage would not involve trespass. You are requested to authorize technical surveillance of the telephone of the JDL headquarters for a three-month period.

Mr. Mitchell thereupon signed the requested authorization for a three-month wiretap. He renewed the authorization, at the request of Mr. Hoover, on March 31, 1971. By that time, two reported District Court decisions rendered in January 1971 had held that in cases not involving foreign intelligence (defined in one case as "espionage and counter-espionage," *United States* v. *Smith,* 321 F. Supp. 424, 426 (C.D. Cal. 1971)), the personal authorization of the Attorney General, based on a finding of "national security," was insufficient to permit electronic surveillance. *United States* v. *Smith, supra; United States* v. *Sinclair,* 321 F. Supp. 1074, 1076 (E.D. Mich. 1971). The second of these cases was decided by District Judge Damon J. Keith, and it was later sustained unanimously by this Court in *United States* v. *United States District Court (Keith*), 407 U.S. 297 (1972). Judge Keith said in his opinion of January 26, 1971 (321 F. Supp. at 1079):

> In the opinion of this Court, the position of the Attorney General is untenable. It is supported neither historically, nor by the language of the Omnibus Crime Act.

On May 4 and 14, 1971, respectively, the decisions in *Smith* and *Sinclair* were cited and applied by Judge William P. Gray of the Northern District of California in *United States* v. *Hilliard,* No. 69-141-Crim., and by Judge John Curtin in *United States* v. *Donghi,* W.D.N.Y. No. CR-1970-81.

6. The Wiretaps Are Disclosed and Suit Is Filed.

Various members of the JDL were indicted in the Eastern District of New York on May 12, 1971, for violating the Gun Control Act. The existence of the wiretap was disclosed in federal court on June 18, 1971, but the wiretap continued until July 3, 1971. On October 7, 1971, the present action was brought seeking damages under 18 U.S.C. § 2520 and under the Fourth Amendment. The district court initially granted summary judgment for Mr. Mitchell, finding that the surveillance he had authorized was lawful even after this Court's *Keith* decision. 363 F. Supp. 936 (D.D.C. 1973). A unanimous *en banc* court of appeals reversed, albeit with six separate opinions. 516 F.2d 594 (D.C. Cir. 1975). On remand, the district

court again granted summary judgment, ruling that *Keith* and *Zweibon I* should not be applied retroactively. 444 F. Supp. 1296 (D.D.C. 1978). The court of appeals reversed once more. 606 F.2d 1172 (D.C. Cir. 1979). It held that the constitutional holdings of *Keith* and *Zweibon I* should be applied retroactively because they were "clearly foreshadowed" by this Court's previous cases. 606 F.2d at 1178-79.

7. The Most Recent Dismissal.

When the case returned again to the district court, the Department of Justice (which has been representing Mr. Mitchell) asserted that it wanted to engage in additional discovery. Notices of deposition were served on all the petitioners. Petitioners' counsel objected on various grounds, asserting, *inter alia,* that the only issue remaining open was Mr. Mitchell's good faith immunity defense and that petitioners' testimony had no conceivable relevance to that defense. The trial judge overruled petitioners' motion for a protective order directed to the proposed depositions and, on being advised that the petitioners would not appear to testify on deposition, dismissed their complaint as a sanction under Rule 37(b) of the Federal Rules of Civil Procedure (pp. 29a-34a, *infra*).

A majority of the court of appeals found it unnecessary to consider the issue whether dismissal was a proper sanction, holding that Mr. Mitchell was entitled to summary judgment on a qualified immunity defense under the standard of *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982). The majority held that the illegality of the JDL wiretap was not "clearly established" in September 1970 and in early 1971 because "the Supreme Court issued no pronouncement on the legality of warrantless domestic national security surveillance until a year *after* the JDL wiretaps had been terminated" (pp. 13a-14a, *infra;* emphasis in original). While acknowledging that the Attorney General had disregarded "the advice of some of his advisors" (p. 18a, n. 16, *infra*), and while recognizing that "every first-year law student learns how to distinguish cases which on first blush seem squarely on point" (p. 22a, *infra*), the court of appeals held that the Attorney General was not required "to guess, at his peril" which legal interpretation might ultimately prevail (p.

17a, *infra*). Judge Swygert dissented, noting that the rule that individuals engaged in warrantless wiretapping were acting illegally had been "clearly established" since *Katz* v. *United States,* 389 U.S. 347 (1967) (p. 25a, *infra*). It was the proposed exception to the *Katz* rule, on which Mr. Mitchell was relying, that had not been "clearly established." Judge Swygert said (p. 27a, *infra*):

> Because the fourth amendment warrant requirement is presumed to apply unless a clear exception excuses compliance, and because no exception for national security cases was established when Mitchell acted, the law to which he was subject was "clearly established."

Judge Swygert would have directed the entry of judgment for the petitioners (p. 25a, *infra*).

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals conflicts with the qualified immunity rule announced by this Court in *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982). The principle that a Cabinet officer has only "qualified" tort immunity—*i.e.,* that he may be liable in damages in certain circumstances—is rendered meaningless if, on the meager showing made here, a Cabinet officer is entitled to summary judgment. Although the court of appeals professed not to permit "impermissible conduct [to] be excused by the drawing of trivial factual distinctions" (p. 22a, *infra*), the court took precisely that approach. The warrant requirement had been established by this Court and no court had excepted from that requirement wiretaps on domestic organizations that were not attempting to overthrow the government. Knowledgeable and experienced high-ranking Justice Department officials expressed the view that there was no possibility of prevailing on a claim of the kind made by Mr. Mitchell.

Mr. Mitchell nonetheless persisted in pressing his untenable legal position until it was rejected by a unanimous Supreme Court. This course of conduct does not entitle him to strip those whose privacy was illegally violated of compensation for the harm they suffered. Such an approach effectively gives a

Cabinet officer absolute immunity, for there will never be a time when a Cabinet officer's conduct cannot be justified by some artificial distinction between the judicial decisions prior to his action and the particular details of the case in which he violated a constitutional right.

Thus, to follow the course set by the court of appeals in this case would prevent the recovery of damages unless an appellate court had applied the relevant principle to the precise facts at hand. By permitting a government official to ignore clear law until each successive effort to establish exceptions has failed, the court of appeals' decision undermines this Court's objective in *Harlow* v. *Fitzgerald*, in which the Court said that an official who "could be expected to know that certain conduct would violate statutory or constitutional rights . . . should be made to hesitate." 457 U.S. at 819. Rather than making a Cabinet officer "hesitate" to violate constitutional rights, the decision below encourages such violation so long as he can devise a distinction that a "first-year law student" might understand.

Mr. Mitchell could easily have followed the advice of his experienced subordinates and obtained a warrant in this case. His failure to do so demonstrates the need to hold government officials liable when they consciously ignore the commands of the Constitution. Mr. Mitchell's choice was not between wiretapping or not wiretapping but between doing so with a warrant and subject to Congress' statutory prescriptions or without a warrant, with no statutory limitation whatever.

It is misleading to speak, as the court of appeals did, of decisions that a Cabinet officer must make "at his peril" (p. 17a; p. 19a, n. 17, *infra*). We note, preliminarily, that the court below ignored the "peril" to the constitutional rights of privacy of the petitioners. Although a unanimous court of appeals has held that the JDL wiretap was illegal, its victims are left with no compensation whatever for the harm they incurred.[2] If the injury had been physical—if bones had been broken or limbs crippled—the injustice of the decision below would be even more obvious.

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[2] It is not clear, in view of the Justice Department's representation of Mr. Mitchell throughout this litigation, whether he or the government would be expected to pay any damage award.

Judge Swygert, in dissent, applied the correct standard to these circumstances. The prevailing rule—*i.e.*, that a government agent who intercepts wire or oral communications without a judicial warrant is acting unlawfully and unconstitutionally unless he qualifies for a legal exception—was "clearly established" by *Katz* v. *United States, supra.* It is not sufficient for a federal official who has violated this "clearly established" rule to say that he can conceive of an exception in his case, and until the door is closed on that exception, its existence and potentiality is an absolute defense to a tort action. For an exception to a general rule of liability to be recognized, the exception should rise to a minimal level of potential acceptability. That simply was not shown here.[3]

2. There is a conflict in the Circuits over the extent of Attorney General Mitchell's civil liability for warrantless wiretaps authorized by him in the period prior to the *Keith* decision. *Forsyth* v. *Kleindienst,* 551 F. Supp. 1247 (E.D. Pa. 1982), concerned a warrantless wiretap conducted in December 1970 and January 1971. Following the Supreme Court's decision in *Harlow* v. *Fitzgerald, supra,* the district court in *Forsyth* refused to grant summary judgment for Mr. Mitchell on the qualified immunity question. The district court analyzed "the status of the applicable law at the time of the wiretap" (which coincided with the wiretap in this case). The conclusion of the district court in the *Forsyth* case applies fully to the facts here (551 F. Supp. at 1256-57):

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[3] The court of appeals believed that its ruling on *Sinclair* v. *Kleindienst,* 645 F.2d 1080 (D.C. Cir. 1981), controlled the disposition of this case. In *Sinclair,* however, the court of appeals upheld a claim of immunity from damages arising out of the *Keith* wiretaps, in reliance on two district court decisions that rested on grounds not available here—that the wiretaps had been approved *prior* to this Court's decision in *Katz* which, both courts noted, was to be given "wholly prospective application." *See United States* v. *Stone,* 305 F. Supp. 75 (D.D.C. 1969); *United States* v. *O'Baugh,* 304 F. Supp. 767 (D.D.C. 1969). In this case, the wiretaps were approved well after *Katz.* Although Mr. Mitchell could not reasonably have believed that his decision to wiretap without a warrant would be sustained, he proceeded with the wiretaps at issue here in the expectation that his action would never be tested in a court of law. Nor did *Sinclair* involve any showing that the Attorney General had disregarded the advice of the Solicitor General and the Assistant Attorney General in charge of the relevant division. In this case, such proof is in the record.

> Thus, in 1967, the *Katz* majority opinion and two concurrences should have clearly alerted defendant Mitchell that electronic surveillance such as the Davidon tap was subject to the warrant requirement of the Fourth Amendment. Instead of seeking to obtain a warrant for the Davidon tap, defendant Mitchell and his aides gambled that Justice White's position would be accepted if the Court were to be faced with this issue in an actual case rather than a hypothetical debate. The Justice Department lost that gamble in *Keith*. Today, defendant Mitchell asks that this Court conclude that he acted in good faith merely because there exists a general policy in favor of shielding public officials from unmeritorious lawsuits. *Nixon* v. *Fitzgerald,* and *Harlow* v. *Fitzgerald* suggest no such result. Defendant Mitchell's disregard for the rights of those whose privacy was invaded becomes all the more incomprehensible in light of the ease with which the government could have sought a warrant for the Davidon tap. There was no need for instantaneous installation of the tap. As heretofore noted, the District of Columbia was well-supplied with judicial officers who could have been approached concerning the electronic surveillance. If such a neutral and detached magistrate were convinced of the existence of probable cause for electronic surveillance, a warrant could have been issued almost immediately.

On the qualified immunity issue, the *Forsyth* court concluded as follows (551 F. Supp. at 1258):

> In light of the statute (18 U.S.C. § 2510-20), its legislative history, and the clear case law interpreting the warrant requirement of the Fourth Amendment, defendant Mitchell's violation of plaintiff's clearly established legal right is apparent. This misunderstanding of the law is all the more surprising coming from the Attorney General, the chief law enforcement officer of the United States. It was incumbent upon the chief law enforcement officer of the United

> States in 1970 to be aware of the clearly defined Constitutional and statutory limitations on his authority to approve a warrantless wiretap under the undisputed circumstances in this case.
>
> As the Supreme Court stated in *Harlow* v. *Fitzgerald,* an official who should have expected to know that his conduct would violate constitutional rights "should be made to hesitate." (102 S.Ct. at 2739). This the defendant, despite his position of authority, power, and trust, did not do. Defendant Mitchell, on the basis of this record is not entitled to qualified immunity under the standards set forth in *Harlow* v. *Fitzgerald.*

The Court of Appeals for the Third Circuit has refused to hear an interlocutory appeal from this decision and has refused to mandamus the district judge. *Forsyth* v. *Kleindienst,* 729 F.2d 267 (3d Cir. 1984). Thus a different standard governing Mr. Mitchell's acts—and those of any Cabinet officer—applies in the Third Circuit than in the District of Columbia Circuit. This Court should resolve that conflict.

3. In *Zweibon III* the court of appeals dismissed petitioners' claims based on 18 U.S.C. § 2520 on the ground that its holding in *Zweibon I* on Title III liability was unanticipated and was not "clearly foreshadowed." If the Court grants certiorari on the principal issue now in the case, it should also consider this issue of retroactive liability under the Omnibus Crime Control Act. A trial of this case should not be held only on Mr. Mitchell's constitutional liability if statutory liability also exists. In this regard, the Court should decide (1) whether plaintiffs who successfully established that warrantless wiretaps on them violated the Omnibus Crime Control Act may nevertheless be denied damages under the Act and (2) whether the civil liability prescribed by 18 U.S.C. § 2520 contemplates *any* good faith immunity defense whatever. The words of the statute limit the defense of "good faith reliance" to reliance upon only "a court order or legislative authorization." It is clearly wrong to engraft onto the statute the broader good faith immunity defense applicable to constitutional causes of action.

CONCLUSION

This case presents extremely important legal issues that affect other cases pending in the lower courts in the wake of *Harlow*. The court of appeals' decision renders meaningless the immunity standard enunciated by this Court in *Harlow* v. *Fitzgerald*, and thereby undermines the protections afforded by tort suits for the vindication of constitutional rights. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 7, 1984

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1626

BERTRAM ZWEIBON, et al., APPELLANTS

v.

JOHN N. MITCHELL, individually and as Attorney General of the United States, et al.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 71-02025)

Argued November 22, 1982

Decided October 21, 1983

Nathan Lewin, with whom *Jamie S. Gorelick* was on the brief, for appellants.

Larry Lee Gregg, Attorney, Department of Justice, with whom *Stanley S. Harris*, United States Attorney, and *Barbara L. Herwig*, Attorney, Department of Justice, were on the brief, for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: EDWARDS, *Circuit Judge*, MACKINNON, *Senior Circuit Judge*, and SWYGERT,* *Senior Circuit Judge*, United States Court of Appeals for the Seventh Circuit.

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

Dissenting opinion filed by *Senior Circuit Judge* SWYGERT.

MACKINNON, *Senior Circuit Judge*: This is our fourth foray into this protracted litigation. Past history notwithstanding, this decision should dispose of the matter.

Appellants, members of the Jewish Defense League (JDL), brought this action in 1971 against John N. Mitchell,[1] who as Attorney General authorized warrantless electronic surveillance of the JDL during 1970 and 1971. Appellants now challenge the district court's order, entered after our third remand, which dismissed their complaint pursuant to Fed. R. Civ. P. 37(b) for their refusal to comply with deposition notices. Because we find that Mitchell is entitled to qualified immunity under the Supreme Court's recent decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982), we affirm the decision of the district court without reaching the question whether dismissal was an appropriate sanction.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] Nine special agents of the Federal Bureau of Investigation were also named as defendants, but they were dismissed from the case in earlier proceedings and are not parties to this appeal. *See* Record of Status Call at 3 (Dec. 1, 1981) (IV App. 68). [References to the Joint Appendix filed with the briefs in this appeal are designated as "IV App." to distinguish that volume from appendices, also referred to herein (*e.g.*, "III App."), which were filed on previous appeals in this case.] For clarity, we refer to Mitchell throughout this opinion as the sole defendant to this action.

I. Factual Background

The facts of this case need only be sketched here, as they are set out in exhaustive detail in our opinion in *Zweibon v. Mitchell* (*Zweibon I*), 516 F.2d at 594 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976). In 1970 and 1971, the telephones of the JDL were tapped by the FBI, which acted without a warrant under a specific directive from Mitchell.[2] Mitchell, in turn, had responded to official requests for such authorization from J. Edgar Hoover, who adverted to Soviet complaints about sometimes violent JDL demonstrations against Soviet personnel and installations in New York.[3] Electronic surveillance was sought in order to forestall deterioration in American-Soviet relations and to avoid threatened retaliation against American citizens in Russia. *See id.* at 608-09 & nn.20-23; *Zweibon v. Mitchell*, 363 F. Supp. 936, 939-42 (D.D.C. 1973). Against the advice of his legal counselors,[4] Mitchell authorized the warrantless taps on September 15, 1970.[5]

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[2] A preexisting Presidential directive expressly delegated to the Attorney General responsibility and authority for exercising the President's putative authority to approve warrantless electronic surveillance in national security cases. *See* President Johnson's Memorandum for the Heads of Executive Departments and Agencies (June 30, 1965), *reproduced at Zweibon I*, 516 F.2d at 674-75, app. A.

[3] Hoover's memorandum is discussed in our opinion in *Zweibon I*, 516 F.2d at 609 n.24.

[4] *See* Memorandum from Assistant Attorney General J. Walter Yeagley, Internal Security Division, to the Attorney General at 4-5 (Apr. 1, 1969) (IV App. 20-21); Memorandum from the Solicitor General to the Attorney General at 7-8 (Apr. 3, 1969) (IV App. 28-29); Memorandum from the Solicitor General to the Attorney General at 2-5 (Apr. 7, 1969) (IV App. 35-38). *But see* Memorandum from Assistant Attorney General Will Wilson, Criminal Division, to the Attorney General at 1 (Apr. 15, 1969) (IV App. 40) (urging, without legal analysis, that "wiretaps involving . . . dangerous and violent internal subversion" be defended as constitutional).

[5] Mitchell's signed approval, dated September 15, 1970, was affixed to the bottom of Hoover's memorandum requesting

The first wiretap was in place during the month of October 1970. *Zweibon I*, 516 F.2d at 609. The volume of JDL protests increased during the last two months of 1970, and on January 4, 1971, Mitchell approved an official FBI request for authority to reinstitute surveillance for a period of 90 days. *Id.* at 609-10. Authority was extended for another 90 days on March 31, 1971. *See* Memorandum from J. Edgar Hoover to the Attorney General (Mar. 31, 1971) (III App. 72).

On May 12, 1971, indictments were returned against a number of JDL members—including five of the appellants in this action—on federal charges under the Gun Control Act of 1968.[6] Prosecutors disclosed the existence of the taps on June 18, 1971, during pretrial proceedings in two consolidated criminal cases stemming from the indictments.[7] In apparent violation of Mitchell's own directive against overhearing conversations of a federal criminal defendant or his attorney,[8] the taps continued after indictment and even after their disclosure by the prosecution.[9] There is, however, no evidence to suggest that

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the authorization. Memorandum from J. Edgar Hoover to the Attorney General at 2 (Sept. 14, 1969) (III App. 69).

[6] Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified at scattered sections of Titles 18 and 26 U.S.C.).

[7] These criminal cases are United States v. Bieber, No. 71-CR-479 (E.D.N.Y.), and United States v. Joffe, No. 71-CR-480 (E.D.N.Y.). The pretrial hearing is unreported. *Zweibon I*, 516 F.2d at 607 n.15.

[8] In a letter dated July 14, 1969, Mitchell had prohibited the overhearing of conversations of a federal criminal defendant or his attorney. *See Zweibon I*, 516 F.2d at 611 & n.34; Memorandum from J. Edgar Hoover to the Attorney General at 2 (Jan. 4, 1971) (III App. 71). Bertram Zweibon, who is lead plaintiff in this action, was a counsel of record in the criminal proceedings. *Zweibon I*, 516 F.2d at 611 n.33.

[9] Indictments were returned on May 12; the taps were revealed on June 18; and the surveillance was terminated on July 3. *See Zweibon I*, 516 F.2d at 605 n.10, 610 n.31.

Mitchell knew surveillance had not been terminated upon indictment as he had previously directed.[10] *See Zweibon I*, 516 F.2d at 610-11 & n.34.

II. Procedural History

Shortly after the surveillance was revealed, appellants filed this action for damages allegedly flowing from the overhearings. The taps were alleged to have violated appellants' rights under both the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1976). The action was promptly stayed pending the Supreme Court's decision in *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972). On June 19, 1972, the Supreme Court decided *Keith*, holding that there exists no exception from the warrant requirement for surveillance justified solely on the basis of *domestic* threats to the national security. *Id.* at 321. The Court expressly left open, however, "the issues which may be involved with respect to activities of foreign powers or their agents," *id.* at 322 (footnote omitted), and it did not articulate precise definitions of "domestic" and "foreign" threats to national security. *See id.* at 309 n.8.

A year later, the district court granted Mitchell's motion for summary judgment. 363 F. Supp. 936 (D.D.C. 1973). The court distinguished *Keith* as "dealing only with the domestic aspects of our national security," *id.* at 943, and concluded that warrantless surveillance of the JDL was a lawful "exercise of the President's constitutional authority to conduct the nation's foreign rela-

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[10] In fact, Hoover's memorandum seeking the first 90-day authorization concluded with an express assurance that the requested "monitoring [would] be conducted in accordance with the instructions set forth in your letter of July 14, 1969, entitled 'Electronic Surveillances.'" Memorandum from J. Edgar Hoover to the Attorney General at 2 (Jan. 4, 1971) (III App. 71). Mitchell approved the request by signing immediately below this assertion. *Id.*

tions and his power to protect the national security." *Id.* at 942. The court also ruled that Title III of the Omnibus Crime Control and Safe Streets Act did not address itself to "national security surveillances" that have "foreign aspects." *Id.* at 943.

This court, sitting *en banc*, reversed. *Zweibon I*, 516 F.2d 594 (1975). Although all eight judges found the wiretaps to be illegal, the appeal spawned six separate opinions on the constitutional and statutory issues.[11] We remanded for consideration of affirmative defenses not yet reached by the district court.

On remand appellants filed a demand for a jury trial on the remaining issues. The district court struck the demand (*see* III App. 193), apparently on the ground that it was untimely. *See* Defendants' Motion to Strike Plaintiffs' Demand for Jury Trial (III App. 192). Upon appellants' subsequent petition for mandamus, we concluded that appellants had not waived their right to demand a jury trial on the affirmative defense of good

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[11] A plurality of the court joined Judge Wright's opinion, which found violations of both the Fourth Amendment and Title III. *Zweibon I*, 516 F.2d at 604-73 (plurality opinion). Judges McGowan and Robb filed concurring opinions; they found it unnecessary to reach the constitutional questions because they deemed the taps to be violative of Title III. *Id.* at 681-87 (McGowan, J., concurring in the judgment); *id.* at 688-89 (Robb, J., concurring). Judges MacKinnon and Wilkey filed opinions concurring in part and dissenting in part; both concluded that the JDL surveillance violated appellants' rights under the Fourth Amendment, but rejected the other judges' finding that Title III had also been contravened. *Id.* at 689-706 (Wilkey, J., concurring and dissenting); *id.* at 706-07 (MacKinnon, J., concurring in part and dissenting in part). Finally, while concurring in the plurality's disposition of the statutory and constitutional questions, Judge Bazelon wrote separately to disapprove the court's decision to permit Mitchell to raise certain affirmative defenses on remand. *Id.* at 675-81 (Bazelon, J., concurring in part, dissenting in part).

faith immunity. *In re Zweibon* (*Zweibon II*), 565 F.2d 742 (D.C. Cir. 1977) (per curiam).

While the mandamus petition was pending, Mitchell revived his motion for summary judgment. *See* Defendants' Renewed Motion for Summary Judgment (III App. 348). He argued that the decisions in *Keith* and *Zweibon I* should not be given retroactive application to either the statutory or the constitutional claims. The district court agreed and granted his renewed motion for summary judgment. *Zweibon v. Mitchell*, 444 F. Supp. 1296, 1298-1300 (D.D.C. 1978).

We again reversed. *Zweibon v. Mitchell* (*Zweibon III*), 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981). While agreeing with the district court that our application in *Zweibon I* of Title III to unconstitutional national security surveillance "represented a sharp break in the law which should be restricted to prospective effect," *id.* at 1182, we found that equitable considerations weighed in favor of applying *Keith* and *Zweibon I* retroactively to the constitutional claims. *Id.* at 1177-81. Despite the existence of contradictory lower court rulings, we rejected Mitchell's claim that the outcome in *Keith* and *Zweibon I* was not clearly foreshadowed. *Id.* at 1179. However, we observed that while

> [c]ontradictory lower court rulings might not establish that a decision was not clearly foreshadowed and should not have retroactive effect, . . . *such a split of decisions might provide reasonable grounds for taking actions based on one or the other position for official immunity purposes.*

Id. at 1181 n.49 (emphasis added). We explictly noted that any concerns we might entertain for the fairness of retroactivity in this case were allayed by the potential availability of the good faith immunity defense. *See id.* at 1180-82 & nn.49-50. Accordingly, we again remanded for consideration of Mitchell's good faith defense.

On the third remand, the district court held a status conference. At that time, counsel for Mitchell was permitted, with the qualified consent of appellants, *see* note 13 *infra*, to proceed with discovery. Record of Status Call, *supra* note 1, at 13 (IV App. 78). Counsel advised that paper and deposition discovery would be sought, with a view to filing a new motion for summary judgment based on an expanded record following the disposition of *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982), which had just been argued before the Supreme Court.[12] *See* Record of Status Call, *supra* note 1, at 5-8, 12 (IV App. 70-73, 77). In particular, counsel declared his intention to depose all the appellants.[13] *Id.* at 10 (IV App. 75). Counsel for appellants objected to these proposed depositions as

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[12] In *Zweibon III*, this court incorporated the opinion issued the same day in Halperin v. Kissinger, 606 F.2d 1192, 1208-10 (D.C. Cir. 1979), as a basis for rejecting Mitchell's claim that he was entitled to absolute or qualified immunity as a matter of law. He was left to pursue on remand a qualified immunity defense grounded on subjective and objective criteria. *Zweibon III*, 606 F.2d at 1181. The Supreme Court was unable to resolve the immunity issues in *Halperin*, which was affirmed by an equally divided Court. 452 U.S. 713 (1981). Subsequently, writs of certiorari were granted in Nixon v. Fitzgerald, 452 U.S. 959 (1981), and Harlow v. Fitzgerald, 452 U.S. 959 (1981), which presented similar immunity issues.

[13] Counsel for Mitchell also announced an intention to depose nonparties in order to corroborate Mitchell's recollection of events surrounding his approvals of the JDL surveillance. Record of Status Call, *supra* note 1, at 8-9 (IV App. 73-74). It was to these depositions that appellants acceded, *id.* at 6 (IV App. 71), but no such depositions were ever noticed. Counsel for Mitchell also described his intention to depose all the appellants as "tentative," depending on the quality of responses he obtained from paper discovery. *Id.* at 10 (IV App. 75). Nonetheless, appellee noticed depositions of all appellants *before* he served them with interrogatories and requests for admissions. *See* Docket Entries at 6-8 (IV App. 11-12). Depositions were noticed for every working day between February 17 and March 17, 1982, a schedule even appellee characterizes as "intensive." Brief for Appellee at 13.

burdensome and unnecessary, but the court refused to circumscribe appellee's discovery at that time. *Id.* at 12-13 (IV App. 77-78).

During December 1981, deposition notices, interrogatories, and requests for admissions were served on all appellants. Docket Entries at 6-8 (IV App. 11-13). Appellants responded to the paper discovery but moved for a protective order quashing the notices of deposition. Motion for Protective Order (IV App. 54). Appellants contended that the proposed schedule was too intensive and the information sought by appellee was irrelevant to the remaining issues in the case. *See* Memorandum in Support of Plaintiffs' Motion for Protective Order (IV App. 55-65). Mitchell responded by arguing, *inter alia*, that depositions aimed at revealing the "true nature" of appellants' conduct with respect to Soviet installations might be relevant to the objective reasonableness of his decision to authorize the surveillance. *See* Defendant's Opposition to Plaintiffs' Motion for a Protective Order at 5-6 (IV App. 113-14). Mitchell also contended that depositions might elicit evidence relevant to the calculation of damages, as to which he believed appellants' own conduct might be presented to the jury in mitigation of damages or to preclude punitive damages. *Id.* at 6 (IV App. 114).

The district court denied appellants' motion for a protective order. Order of April 23, 1982 (IV App. 123). Appellants promptly filed a motion for reconsideration, in which they offered to *stipulate* that Mitchell could reasonably have believed reports he had received on JDL activities. Plaintiffs' Motion for Reconsideration of Order Denying Motion for Protective Order at 2, 3-4 (IV App. 125, 126-27). Appellants also "respectfully advise[d] the Court that they [would] not comply with defendant's request for these irrelevant depositions." *Id.* at 3 (IV App. 126).

Subsequently, at a hearing on the motion for reconsideration, counsel for appellants offered to make *one* ap-

pellant available so that the court could better assess the relevance of such testimony. Transcript of Hearing of April 5, 1982, at 3-5, 16 (IV App. 154-56, 167). Counsel also offered not to seek "special" damages, but declined to limit appellants' claim to one for nominal damages. *Id.* at 4-9 (IV App. 154-60). Appellants reiterated their intention to refuse to comply with notices of deposition. *Id.* at 5 (IV App. 156). The district court announced from the bench its decision to dismiss the complaint as a sanction pursuant to Fed. R. Civ. P. 37(b) for appellants' refusal to submit to depositions. *Id.* at 19 (IV App. 170). The final judgment and findings of fact and conclusions of law were entered on May 14, 1982. (IV App. 171-76). This appeal followed.

III. Issues on Appeal

As previously noted, we find it unnecessary to decide whether the district court should have granted appellants' request for a protective order and, if not, whether dismissal was an appropriate sanction for their refusal to comply with notices of deposition. We find Mitchell entitled to summary judgment as a matter of law on the issue of qualified immunity under principles recently enunciated in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982).

While the district court has not yet considered this defense, a reviewing court may rest its affirmance on any ground for which the record is sufficient to permit the necessary findings of fact and law. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *Lew v. Suffridge*, 370 F.2d 487, 488 & n.1 (D.C. Cir. 1966). Appellants do not question the sufficiency of the record as a basis for resolving the defense; indeed, appellants insist that "discovery in this case had been completed before the district court entered summary judgment in 1978."[14] Brief for

[14] Even if discovery had not been completed, the record would be sufficient to adjudicate Mitchell's qualified immunity

Appellants at 16. Moreover, the parties have briefed and argued the qualified immunity defense before this court.[15] Given the Supreme Court's admonition that insubstantial claims against government officials should not proceed to trial, *Harlow v. Fitzgerald*, *supra*, 102 S. Ct. at 2727 (citing *Butz v. Economou*, 438 U.S. 478, 507-08 (1978)), we would be remiss in our appellate duty were we to order yet another remand to resolve what is a purely legal threshold question. *See, e.g., Ellsberg v. Mitchell*,

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claim. In *Harlow*, the Supreme Court characterized the defense as a "threshold immunity question" before the resolution of which discovery should not be allowed. 102 S. Ct. at 2739.

[15] Appellants anticipated and addressed the immunity issues in their opening brief—*before* Mitchell had formally raised the issue in his brief on this appeal. Such anticipation was hardly prophetic, given the tenor of the Supreme Court's *Harlow* decision and defense counsel's previously stated intention to file a new motion for summary judgment once *Harlow* had been decided. *See* Record of Status Call, *supra* note 1, at 5-8, 12 (IV App. 70-73, 77).

Mitchell also argues that as Attorney General he is entitled to absolute immunity from actions for damages arising out of national security electronic surveillance. *See Harlow v. Fitzgerald*, *supra*, 102 S. Ct. at 2736 & n.18 (dictum). We find it unnecessary to reach this issue, since, as we hold below, Mitchell is clearly entitled to qualified immunity. We deem it prudent to defer the question until we are faced with a situation in which an Attorney General has trampled on unquestioned constitutional or statutory rights in the name of "national security." The careful balancing of competing values that inhere in immunity analysis—the public interest in encouraging the vigorous exercise of official authority and the importance of a damages remedy for the vindication of constitutional guarantees, *id.* at 2733; *Butz v. Economou*, *supra*, 438 U.S. at 504-06—should not be attempted until the accommodation of those values can be tested in a concrete factual setting. We decline, therefore, the invitation to reach out and resolve in dicta this important and difficult question. *See Ellsberg v. Mitchell*, *supra*, slip op. at 1 n.1 (MacKinnon, J., concurring in part and dissenting in part).

No. 82-1085, slip op. at 5-7 (D.C. Cir. May 10, 1983) (MacKinnon, J., concurring in part and dissenting in part); *Hall v. United States*, 704 F.2d 246, 249-51 (6th Cir. Mar. 25, 1983); *Silverman v. Ballantine*, 694 F.2d 1091, 1096 (7th Cir. 1982); *Wolfel v. Sanborn*, 691 F.2d 270, 272 (6th Cir. 1982) (per curiam) (Weick, J., dissenting), *cert. denied*, 103 S. Ct. 751 (1983).

A. *The* Harlow *Standard*

Before *Harlow*, qualified immunity was denied an official who

> knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [complainant] or if [the official] took the action with malicious intention to cause a deprivation of constitutional rights or other injury.

Wood v. Strickland, 420 U.S. 308, 320 (1975). The old test thus had objective and subjective elements: immunity was available only if the official had neither violated clearly established law nor acted out of malice. *See, e.g., Procunier v. Navarette*, 434 U.S. 555, 562 (1978). Aware that denying absolute immunity to officials might subject them to harassing civil litigation, the Court admonished judges quickly to weed out frivolous claims through firm application of the Federal Rules of Civil Procedure. *Butz v. Economou*, *supra*, 438 U.S. at 507-08; *see Hanrahan v. Hampton*, 446 U.S. 754, 765 (1980) (Powell, J., concurring in part and dissenting in part).

The Court discovered, however, that questions of subjective intent are rarely amenable to resolution on motions for summary judgment and that the broad-ranging discovery which resulted could often be disruptive of effective government. *Harlow v. Fitzgerald*, *supra*, 102 S. Ct. at 2737. Accordingly, the Court in *Harlow* made an "adjustment" of the standard for qualified immunity by severing the subjective element from the defense. *Id.*

at 2737-39. Concluding that "bare allegations of malice" should not be sufficient to subject officials to the burdens of trial and discovery, the Court held that government officials

> generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 2737 (citing *Procunier v. Navarette*, *supra*, 434 U.S. at 565; *Wood v. Strickland*, *supra*, 420 U.S. at 321). Thus, once the trial judge determines that the law was not clearly established at the time the contested conduct occurred, the inquiry ceases. *Id.* at 2738-39. At that point the official is entitled to summary judgment as a matter of law, and "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Id.* at 2739.

B. *The Test Applied*

Our task after *Harlow*, therefore, is to measure Mitchell's conduct by reference to clearly established law at the time these wiretaps were authorized. The precise contours of what constitutes "clearly established law" for immunity purposes are difficult to delimit, and the Supreme Court has offered little guidance in this regard. *See id.* at 2738 n.32 ("As in *Procunier v. Navarette*, 434 U.S. 555, 565 (1978), we need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the Local District Court.'"). We too are spared that Herculean labor, since we conclude that the illegality of Mitchell's conduct was not "clearly established" by any reasonable definition of the phrase.

As noted above, *see* pages 4-5 *supra*, the Supreme Court issued no pronouncement on the legality of warrantless

domestic national security surveillance until a year *after* the JDL wiretaps had been terminated. Even then, in declaring such searches illegal, the Court declined to articulate a crisp distinction between "foreign" and "domestic" threats to national security. *See Keith*, *supra*, 407 U.S. at 309 n.8. It is not surprising, therefore, that the district court should have reached one conclusion as to the legality of the JDL taps and that this court should have expended six separate opinions and over one hundred pages of analysis to reverse that conclusion. As appellee points out, a reading of *Zweibon I* alone "bel[ies] any suggestion that the Court was confronted with a simple issue automatically controlled by earlier decisions." Brief for Appellee at 61. Indeed, we observed in *Zweibon I* that this case "involve[s] the foreign affairs of this country and therefore falls outside the holding in *Keith* and into the area it reserved for further disposition." 516 F.2d at 652; *see Keith*, *supra*, 407 U.S. at 309 n.8, 321-22.

Moreover, we recently had occasion in *Sinclair v. Kleindienst*, 645 F.2d 1080 (D.C. Cir. 1981), to consider whether factually similar warrantless surveillances violated clearly established law. *Sinclair* involved alleged constitutional violations stemming, in part, from the very surveillance which culminated in the *Keith* decision. The FBI had maintained wiretaps on the Black Panther and White Panther parties between February 1969 and January 1971. *Id.* at 1081. As in the present case, the government unsuccessfully asserted that warrants were unnecessary because the taps were aimed at collecting information necessary to protect the nation's internal security. After the *Keith* Court spurned that assertion, plaintiffs brought an action for damages against Mitchell and other officials. The district court granted summary judgment in favor of Mitchell on the issue of qualified immunity. *Id.* at 1082-83.

We affirmed the decision regarding immunity. *Id.* at 1084-85. Observing that the Supreme Court had expressly

reserved ruling on the legality of warrantless national security surveillances in *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967), we noted that the only federal courts that had addressed the issue at the time the wiretaps were in place had concluded that warrants were unnecessary. *Sinclair v. Kleindienst*, *supra*, 645 F.2d at 1084 (citing *United States v. Stone*, 305 F. Supp. 75 (D.D.C. 1969); *United States v. O'Baugh*, 304 F. Supp. 767 (D.D.C. 1969)). As a result, we held that for purposes of qualified immunity Mitchell had entertained a reasonable belief in the legality of his conduct. *Sinclair v. Kleindienst*, *supra*, 645 F.2d at 1084-85 (citing *Chagnon v. Bell*, 642 F.2d 1248, 1258 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 911 (1981)).

Our decision in *Sinclair* controls the disposition of this appeal. If there was no clearly established warrant requirement as of January 1971 (the date of the last surveillance in *Sinclair*), it follows that there was no such requirement as of March 31, 1971 (the date Mitchell authorized the last series of JDL surveillances), or even as late as July 3, 1971 (the date the surveillance was finally terminated). *See* note 9 *supra*.

We also acknowledged in *Sinclair* that there "was no judicially imposed reasonableness requirement for national security wiretaps at the time," *id.* at 1082, and that the minimization procedures Mitchell himself had prescribed, *see* note 8 *supra*, "predated any judicial requirement for them in national security surveillance." 645 F.2d at 1085. Similarly, in *Chagnon v. Bell*, *supra*, we noted that even in its 1972 *Keith* opinion the Supreme Court had "declined to delineate 'precise standards for domestic security warrants'" and instead had invited Congress to articulate them. 642 F.2d at 1262 (quoting *Keith*, *supra*, 407 U.S. at 323). It is plain, therefore, that there existed no clearly established warrant or reasonableness requirements at the time Mitchell authorized the JDL surveillance.

Undaunted, appellants proffer three "critical" bases for distinguishing *Sinclair*—a decision they do not even deign to cite in their opening brief. None of the bases is "critical."

First, appellants maintain that, even if it had been reasonable to conclude in 1970 that no warrant was required to eavesdrop on the Black Panther Party—which threatened violent overthrow of the government and maintained some contact with foreign governments—it was not similarly reasonable to conclude that it was lawful to conduct warrantless surveillance of the JDL—a domestic group "which posed no threat to our own government and did not act in concert with a foreign power." Appellants' Reply Brief at 13. That such a slender distinction is not "critical" seems self-evident, especially in light of the complex arguments and sharp differences of opinion that characterized our various analyses of the Fourth Amendment claims in *Zweibon I*. *See* note 11 *supra*. Even in *Keith*, the Supreme Court declined to elaborate on the incidents of "foreign" versus "domestic" surveillances. 407 U.S. at 309 n.8. Consequently, we refused to follow precisely this route in *Zweibon I*:

> *Although appellants contend and appellees admit that the JDL is a domestic organization with no Russian connection, that fact does not mean that appellants are correct in their assertion that the warrantless surveillance here is automatically unlawful.* In *Keith*, "[t]here was no evidence of any involvement, directly or indirectly, of a foreign power." Here, by contrast, while there is no collaboration between the JDL and Russia—quite the reverse—JDL's activities did involve Russia in a confrontation with the United States. Thus this case does indeed involve the foreign affairs of this country and therefore falls outside the holding in *Keith* and into the area it reserved for future disposition. Although the type of involvement here was not anticipated in *Keith*, there is no indication that *Keith* intended to limit "involvement" to collaboration with

a foreign power. Collaboration simply was the most obvious example of how a domestic organization could become involved in the foreign affairs of this country.[189]

[189] *See* 407 U.S. at 309 n.8, 80 S.Ct. 2125. For example, if the defendant in *Keith* had been financed by a foreign power, the Court would have treated the case as involving the foreign aspects of our national security even though the foreign power had itself taken no overt action against this country. *In our case, since the threat to national security emanated from Russia, there is no question that the President's foreign affairs powers must be considered in our decision whether the surveillance was lawful.*

516 F.2d at 652 & n.189 (footnotes omitted) (emphasis added). A public official should not be made to guess, at his peril, whether distinctions as rarefied as those appellants proffer might one day subject him to personal liability for his official acts. Such a crabbed immunity defense "would dampen the ardor of all but the most resolute." *Gregorie v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) (L. Hand, J.).

Second, appellants contend that contemporaneous internal Department of Justice memoranda written for Mitchell demonstrate that such distinctions were "understood by advisors to this defendant." Appellants' Reply Brief at 13; *see* note 4 *supra*. The short answer to this argument is that it is irrelevant after *Harlow*. It goes only to Mitchell's subjective good faith, an element now shorn from the defense of qualified immunity. *See Harlow v. Fitzgerald*, *supra*, 102 S.Ct. at 2738 (limits of qualified immunity defined "essentially in objective terms"). Furthermore, because "discovery should not be allowed" until the "threshold immunity question is resolved," *id.*, we are reticent to allow appellants to benefit from the fruits of discovery that took place before *Harlow* was decided.[16] Finally, our reading of the internal

[16] We would not have our opinion read to excuse the extraordinarily sly violator "who *actually knows* that he was violat-

memoranda discloses that they make predictions as to future action by the Supreme Court and discuss strategic considerations for potential litigation; the memoranda do not purport to declare what was then legally permissible conduct with respect to warrantless national security surveillance.

Third, appellants would distinguish *Sinclair* on the ground that, by the time Mitchell renewed his second wiretap authorization in this case, two lower courts had found warrantless wiretaps to be improper when directed at domestic groups. Appellant's Reply Brief at 13; *see* Brief for Appellant at 36; *accord Forsyth v. Kleindienst*, 551 F. Supp. 1247, 1255 (E.D. Pa. 1982), *proceedings stayed pending appeal*, 700 F.2d 104 (3d Cir. 1983). It is true that two district courts had so ruled less than three months before Mitchell's March 3, 1971 authorization. *See United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. Jan. 26, 1971); *United States v. Smith*, 321 F. Supp. 424 (C.D. Cal. Jan. 8, 1971). We allow to pass unremarked the exiguous amount of time—roughly two-and-a-half months—appellants apparently would vouchsafe the Attorney General in which to evaluate, assimilate, and apply in a systematic fashion isolated lower court decisions that might bear on the Department's day-

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ing the law . . . , even if he could not 'reasonably have been expected' to know what he actually did know." *Harlow v. Fitzgerald*, *supra*, 102 S. Ct. at 2740 (Brennan, J., concurring) (emphasis in original). The Court's *Harlow* opinion appears to have been carefully crafted to avoid such an egregious, if doubtless rare, result. *See id.* at 2737 ("*bare allegations* should not suffice") (emphasis added); *id.* ("We therefore hold that government officials . . . *generally* are shielded from liability . . . insofar as their conduct does not violate clearly established statutory or constitutional rights . . . .") (emphasis added). We merely conclude that, whatever the wisdom of disregarding the advice of some of his advisors, Mitchell did not "actually know" that his conduct was illegal and that the memoranda cannot otherwise support an inference that his belief was *objectively* unreasonable.

to-day operations.[17] Even if timing were not a factor, we are loath to suggest that the Attorney General of the United States is bound by lone decisions by two local district judges. He occupies a national office, and hence his perspective must be national in scope—especially where national security considerations are implicated.

Moreover, these two decisions were not the only lower court decisions dealing with the putative national security exemption from the warrant requirement; they were merely the first cases to exclude surveillance of domestic organizations from the scope of that exemption. Mitchell could reasonably have relied on *other* lower court decisions in which warrantless national security surveillances were held permissible. *See, e.g., United States v. Butenko*, 318 F. Supp. 66 (D.N.J. 1970), *aff'd*, 494 F.2d 593 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974); *United States v. Brown*, 317 F. Supp. 531 (E.D. La. 1970), *appeal dismissed*, 456 F.2d 1112 (5th Cir. 1972) (per curiam), *aff'd*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); *United States v. Dellinger*, No. 69 Cr. 180 (N.D. Ill. 1970) (III App. 356); *United States v. O'Neal*, Cr. No. KC Cr. 1204 (D. Kan. 1970); *United States v. Clay*, Cr. No. 6711-94 (S.D. Tex. 1969), *aff'd*, 430 F.2d 165 (5th Cir.), *rev'd on other grounds*, 403 U.S. 698 (1971).

Appellants rejoin that Mitchell should have distinguished all these cases. Thus, they suggest that *Dellinger* and *O'Neal* might have been distinguished on the ground that the criminal defendants in those cases were allegedly seeking the overthrow of the government. Brief for Appellant at 35-36. But neither the disclaiming foot-

[17] We find it odd that appellants would charge Mitchell with a duty to apply, at his peril, a couple of lower court decisions to an ongoing surveillance while appellants themselves seek to impugn his reliance on United States v. O'Neal, Cr. No. KC Cr. 1204 (D. Kan. 1970), and United States v. Butenko, 318 F. Supp. 66 (D.N.J. 1970), on the ground that they "were decided after the initial wiretap authorizations." Brief for Appellants at 35.

note in *Katz*, nor Justice White's celebrated concurring opinion therein, purported to confine the open question to surveillances aimed only at efforts to overthrow the government. *See* 389 U.S. at 358 n.23; *id.* at 363-64 (White, J., concurring). Nor did *Katz* suggest that a "national security" exemption might excuse warrantless surveillance directed at foreign embassies (*Clay*, *Brown*) or at individuals allegedly engaged in foreign espionage (*Butenko*), but not surveillance aimed, as in the present case, at meeting threats to our foreign relations or to American diplomatic personnel abroad. We reiterate that even in *Keith* the Supreme Court did not draw the nice distinctions upon which appellants argue the personal liability of an Attorney General should turn.

Perhaps anticipating that efforts to distinguish *Sinclair v. Kleindienst* would be unpersuasive, appellants assail, without citing, the holding of *Sinclair* itself. To this end, appellants maintain that the "clearly established" test for immunity purposes is coterminous with the "clearly foreshadowed" test courts employ to determine whether a judicial decision ought to be given retroactive effect. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Accordingly, appellants conclude that our decision in *Zweibon III* giving retroactive effect to *Keith* and *Zweibon I* disposes of the immunity defense now that *Harlow* bars inquiry into subjective intent. Brief for Appellants at 24-27. In addition, by gathering scattered dicta from *Katz*, *Alderman v. United States*, 394 U.S. 165 (1969), and *Giordano v. United States*, 394 U.S. 310 (1969), appellants "poll" the Supreme Court Justices on the scope of the national security exemption as of 1970. Appellants come up with six Justices (including Justice Fortas) who had indicated their agreement with the proposition *Keith* eventually would establish. As a result, appellants conclude, the unlawfulness of the JDL surveillance was "clearly established" by prior decisions. *See* Brief for Appellants at 32-34.

Even ignoring the inherent difficulties and imprecision that must attend any "vote" based on statements made in other decisional contexts, appellants' "poll" proves nothing, since it applies a different test from that expounded in *Harlow*. The test for qualified immunity is "clearly established," not "clearly foreshadowed." The distinction is self-evident.

Appellants' attempt to pass off the two standards as coterminous receives no support from *Harlow* itself. Nowhere does the Court employ the phrase "clearly foreshadowed"; nor does the Court suggest that its standard bears any relationship to that for retroactivity. To the contrary, immediately after stating its new holding that officials are immune insofar as their conduct does not violate clearly established law, the Court makes clear that the *content* of the standard is identical to that for establishing the "objective" element of the old two-pronged test for qualified immunity. *See* 102 S. Ct. at 2737 (citing *Procunier v. Navarette*, *supra*, 434 U.S. at 565; *Wood v. Strickland*, *supra*, 420 U.S. at 321). Appellants concede that the *Harlow* test "remained . . . the same as had been defined in *Wood v. Strickland*." Brief for Appellants at 25. The concession is telling, for the very pages in *Wood* to which appellants and the *Harlow* Court—direct us describe the objective standard as follows:

> [A]n act violating . . . constitutional rights can be no more justified by ignorance or disregard of *settled, indisputable law* . . . than by the presence of actual malice.
>
> [A school board member] must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the *basic, unquestioned constitutional rights* of his charges.

Wood v. Strickland, *supra*, 420 U.S. at 321, 322 (emphasis added). It is evident that language which speaks

of "indisputable law" and "unquestioned rights" cannot be reconciled with the "clearly foreshadowed" test.

Moreover, our decision in *Zweibon III* evinces a clear understanding of the differences between the tests for retroactivity and immunity. In fact, we invoked those differences to allay any lingering concerns over the fairness of retroactivity:

> Our rejection of the claim that *Keith* and *Zweibon I* should only be applied prospectively because they were not clearly foreshadowed . . . should not be seen to undercut a claim of reasonable grounds for believing the legality of one's actions on the immunity issues. Contradictory lower court rulings might not establish that a decision was not clearly foreshadowed and should not have retroactive effect, but such a split of decisions might provide reasonable grounds for taking actions based on one or the other position for official immunity purposes.

Zweibon III, 606 F.2d at 1181 n.49. *See also id.* at 1181 n.50 ("[W]e believe that because qualified immunity protects potential defendants acting in good faith and in accordance with a reasonable understanding of applicable law, equitable considerations favor retroactivity to provide compensation for constitutional injury."). The two tests, therefore, are not coterminous.

We are not unmindful of the consequences that might attend a too niggardly definition of what constitutes "clearly established" law. Attorneys General are lawyers, after all—often good ones—and every first-year law student learns how to distinguish cases which on first blush seem squarely on point. But the distinctions between Mitchell's conduct here and that condemned in *Katz* or even *Keith* are real and substantial. Mitchell could reasonably have relied on those distinctions in authorizing the JDL wiretaps. Nothing in our opinion today should be read to suggest that impermissible conduct may be excused by the drawing of trivial factual distinctions.

IV. Conclusion

Having carefully considered the record and all of appellants' arguments,[18] we find that Mitchell is entitled to summary judgment as a matter of law on the question of qualified immunity. Therefore, the decision of the district court is affirmed.[19]

Judgment accordingly.

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[18] Two other issues raised by appellants may be disposed of in cursory fashion. First, appellants contend that if the JDL wiretaps constitute "a 'good faith' surveillance undertaken primarily for *prosecutorial* purposes, then [appellee] violated 'clearly established' law." Brief for Appellants at 56 (emphasis in original). We dismissed this argument in *Chagnon v. Bell*, concluding that there exist no clear standards for defining or evaluating the "purpose" of a warrantless national security wiretap. Consequently, allegations of prosecutorial purpose raise no genuine issues relevant to the defense of qualified immunity. 642 F.2d at 1062 n.25.

Second, appellants argue that, even if Mitchell violated no clearly established rights under the Fourth Amendment, appellants' clearly established *Sixth* Amendment rights were violated when the taps remained in place after a number of appellants had been indicted on criminal charges. *See* page 3 & notes 8-9 *supra*. Unfortunately, appellants can advert to no evidence whatsoever that might indicate that Mitchell was aware that the surveillance had not been terminated upon indictment in accordance with the instructions he had previously issued. *Zweibon I*, 516 F.2d at 610-11 ("Mr. Mitchell was unaware that the taps continued for more than a month after criminal indictments were handed down against several individuals (five of whom are plaintiffs in this case) whose conversations, including those with their attorney, were overheard in violation of Justice Department regulations.") (footnotes omitted); *see* page 3 & note 10 *supra*.

[19] The dissent contends that the decision in Katz v. United States, 389 U.S. 347 (1967), "clearly established" that presidentially authorized wiretaps were illegal, and that the Court's explicit reservation regarding "situation[s] involving the national security," *id.* at 358 n.23, was merely a hint that the Court might choose to "create" an exception "in the future." *See infra* at 3. This reading of *Katz* must be rejected. Wise-

taps, in national security situations, were authorized by presidents as early as 1915. The practice became well-established during the administration of President Franklin D. Roosevelt, and was continued by each succeeding administration. See the history of presidentially authorized wiretapping set forth in United States v. Barker, 514 F.2d 208, 243 nn.14 & 16, 246-48 (MacKinnon, J., dissenting). The Supreme Court recently stated that while a practice "in violation of the Constitution" does not become constitutional "by long use," nevertheless "an unbroken practice . . . is not something to be lightly cast aside." Marsh v. Chambers, No. 82-23, slip op. at 7 (U.S. July 5, 1983) (*quoting* Walz v. Tax Commission, 397 U.S. 664, 678 (1970)). A governmental practice established by specific written presidential orders effective continuously for over 40 years must be recognized as being clearly established. And *Katz* also specifically recognized that the constitutional restriction on searches conducted outside the judicial process was "subject . . . to a few . . . exceptions." 389 U.S. at 357. In view of this long-standing and continuous practice, the Court's explicit reservation in *Katz* makes it clear that the Court was referring to existing "exceptions," not, as the dissent asserts, simply speculating about whether it would "create" an exception at some future date.

The dissent also asserts that it is Mitchell's burden to prove that the law was *established* in his favor at the time he acted. This is not consistent with *Harlow*. It was only necessary for the Attorney General to show that the law was unsettled (as the conflicting district court cases and this court's struggles with the issue in *Zweibon I* amply demonstrate), *not*, as the dissent suggests, that a Supreme Court opinion had specifically approved the Attorney General's actions.

SWYGERT, *Senior Circuit Judge*, dissenting: I would reverse the district court's dismissal and direct entry of judgment for the plaintiffs. The issue is whether John N. Mitchell, under whose direction the FBI installed warrantless electronic wiretaps in the Jewish Defense League headquarters between October 1970 and July 3, 1971, is entitled to immunity from liability for his violation of plaintiffs' right to be free from unreasonable searches and seizures. There is no question that Mitchell violated those rights. *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (*en banc*) (*Zweibon I*), *cert. denied*, 425 U.S. 944 (1976). The only question is whether the constitutional prohibition of warrantless eavesdropping in these circumstances was "clearly established" at the time the wiretaps were ordered, under the standard established by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Court there held

> that Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

Mitchell has not met his burden of establishing an immunity defense under the *Harlow* standard. At the time Mitchell ordered the warrantless wiretaps at issue, *United States v. Katz*, 389 U.S. 347 (1967), had established

> that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few exceptions.

Id. at 357 (footnotes omitted).

Because the Supreme Court had expressly reserved ruling on national security wiretaps in *Katz*, the majority

concludes that no clearly established warrant or reasonableness requirements existed at the time Mitchell authorized the surveillance. Although *Katz* did not expressly decide whether the requirements of the fourth amendment could be satisfied in a situation involving the national security if "safeguards" short of a magistrate's authorization were provided, *id.* at 358 n.23; *see also id.* at 364 (White, J., concurring), the majority's reliance on these reservations ignores the Court's broad holding that long-established fourth amendment protections apply to electronic surveillance, as to other forms of intrusions, subject only to well-defined exceptions such as searches incident to arrest, searches made in hot pursuit, and searches subject to consent. *Katz* established no exception to this general rule of fourth amendment applicability for situations involving national security; indeed, the Court emphasized that "[i]t is difficult to imagine how any of those [established] exceptions could apply to the sort of search and seizure involved in this case." *Id.* at 357. The Court's footnote and Justice White's comment did not create a national security exception, but rather declined to state whether such an exception might be created in the future. It was the exception, rather than the rule, that was not clearly established in 1970-1971. The majority's analysis anomalously transforms the lack of an exception into the lack of a rule.

Subsequent cases demonstrate the presumptive breadth of the *Katz* rule. In *United States v. United States District Court*, 407 U.S. 297, 314-21 (1972) (*Keith*), the Supreme Court, relying on the general language of *Katz*, held that judicial approval was required prior to electronic surveillance in domestic national security cases. Similarly, in *Zweibon I*, *supra*, a plurality of this court noted that *Katz* stated a broad and general rule "that warrantless electronic surveillance conducted through non-trespassory methods is an unreasonable search and

seizure within the meaning of the Fourth Amendment." 516 F.2d at 611. Finally, in *Zweibon v. Mitchell*, 606 F.2d 1172, 1179 (D.C. Cir. 1979) (*Zweibon III*), this court held "that *Keith* and *Zweibon I* . . . did not announce a new principle of law, but simply applied the constitutional warrant requirement to national security situations."

The majority's reasoning that the lack of a specific ruling that warrantless electronic surveillance was constitutionally proscribed in national security situations left Mitchell no clearly established guidelines is skewed. In my view, the unquestioned constitutional right that was violated in this case is the right, *reaffirmed* by *Katz* in 1967, to be free from unreasonable searches and seizures. *Katz* did not *extend* fourth amendment protections, but rather concluded that no exception exempted electronic eavesdropping from the coverage of those protections. In the same sense, *Keith* did not *extend* fourth amendment protection to domestic organizations. *See Keith*, 407 U.S. at 320 ("We do not think a case has been made for the requested *departure* from Fourth Amendment standards."). Because the fourth amendment warrant requirement is presumed to apply unless a clear exception excuses compliance, and because no exception for national security cases was established when Mitchell acted, the law to which he was subject was "clearly established." Under the majority's reverse reasoning, "clearly established statutory or constitutional rights" would be fact-bound, circumscribed by the particular circumstances of prior litigated cases, rather than by the principles by which those cases were decided.

Mitchell chose to ignore the principle on which *Katz* turned, apparently gambling that later Supreme Court decisions might limit the universality of *Katz* by establishing exceptions in national security situations. Under the *Harlow* standard, however, government officials who depart from "settled, indisputable law" in the hope that

an exception will later be created justifying their conduct do so at their peril.*

* The majority finds it "odd that appellants would charge Mitchell with a duty to apply, *at his peril*," *see ante* at 19, n.17 (emphasis added), two district court decisions finding warrantless wiretaps unconstitutional when directed at domestic groups. "Application" of *United States v. Smith*, 321 F. Supp. 424 (C.D. Cal. 1971), or *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971), would have resulted in either the cessation of the warrantless wiretaps or the procurement of a warrant. It is unclear to me what "peril" Mitchell would have faced had he chosen either of these options.

Further, it is difficult to reconcile the majority's emphasis on the "reasonableness" of Mitchell's reliance on certain district court opinions with the "irrelevance" of Mitchell's disregard of internal Justice Department memoranda advising him that warrants were required. If the latter are irrelevant under *Harlow*, I would assume the former would be also.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2025-71

BERTRAM ZWEIBON, *et al.*,

Plaintiffs,

v.

JOHN N. MITCHELL,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 14, 1982)

Upon consideration of the plaintiffs' Motion for Reconsideration of this Court's order of April 23, 1982 and the opposition thereto, and of the whole record in this case, including the course of proceedings since remand, this Court makes the following findings and conclusions.

FINDINGS OF FACT

1. During the December 1, 1981 status conference in this case, counsel for defendant advised that the defense would seek paper and deposition discovery from the plaintiffs in the coming months. Counsel further advised that "it's possible that after we get responses to the paper discovery that it would not be necessary to take all of the plaintiffs' depositions" (Tr. 10). Plaintiffs' counsel resisted depositions on the ground that they would be a nuisance. After discussion of the discovery issue, the Court stated that it would not cut off defendant's discovery. The Court received no indication that plaintiffs would resist

depositions at a later date. On February 9, 1982, however, plaintiffs moved for a protective order quashing defendant's notices of depositions on the grounds of burden and relevance. Defendant opposed that motion after all but one of the plaintiffs' responses to the paper discovery had been received. Defendant challenged plaintiffs' burdensomeness and relevance arguments and urged that plaintiffs' virtually identical responses in part contradicted by published accounts of at least one of plaintiffs' statements, justified discovery by deposition. On April 23, 1982, the Court denied plaintiffs' motion after concluding that plaintiffs had not shown sufficient "good cause," to deny defendant depositions as required by Rule 26(c) of the Federal Rules of Civil Procedure.

2. By the Order of April 23, the plaintiffs were directed to propose a deposition schedule, in view of their earlier argument that the defendant's proposed schedule was too burdensome, and the parties were required to confer in an effort to resolve "any dispute as to scheduling" the plaintiffs' depositions. It does not appear that the plaintiffs complied with this portion of the April 23 Order prior to the filing of the present motion for reconsideration.

3. The depositions of the plaintiffs have not been taken since the remand of this case from the Court of Appeals after the plaintiffs' first appeal, *Zweibon v. Mitchell,* 516 F.2d 594 (D.C. Cir. 1975). While the depositions of three plaintiffs were taken prior to that time, they were the subject of a motion to compel by the defendant, and are not material to the consideration of the present motion.

4. The Order of April 23 requires the defendant to make reasonable efforts to accommodate the plaintiffs' convenience in scheduling the depositions. There has been no indication that defendant has been unwilling to accommodate plaintiffs in this regard. Indeed, at the December 1, 1981 status conference, defendant's counsel expressed a willingness to agree to suitable arrangements with plaintiffs' counsel (Tr. 10).

5. At the December 1, 1981 status conference, after the defendant announced his intention to take discovery, the plaintiffs resisted. While the plaintiffs' showing at that time was

insufficient to focus on the issue, the Court expressed a disposition to permit the discovery sought, though it was not then clear that such discovery was necessary. After the status call the plaintiffs moved for a protective order, and the defendant opposed that motion. The Court concluded that the discovery sought would lead to evidence or be itself evidence bearing on one or more of the potential issues in this case; on that basis, the motion was denied.

6. On April 29, 1982, plaintiffs filed a motion to reconsider this Court's order of April 23, 1982, which denied plaintiffs' request for a protective order. In their motion to reconsider, plaintiffs stated that the proposed depositions of the individual plaintiffs were so "onerous and unjustified" that they "will respectfully refuse to comply" with any such notice of deposition. (Plaintiffs' Motion for Reconsideration at 1). Plaintiffs noted further that if the Court dismissed the case because of their refusal to permit deposition discovery, "we will take another appeal to the Court of Appeals." (Plaintiffs' Motion for Reconsideration at 3.)

7. At a status hearing held in this case on May 7, 1982, plaintiffs' counsel, in response to questions from the Court, repeated that his clients would not comply with any notices for the taking of their depositions. Counsel for both plaintiffs and defendant agreed that in determining the appropriate sanctions which should result from plaintiffs' refusal to permit such discovery, the Court need not wait until defendant formally notices the deposition of each plaintiff who would then refuse to comply. Opposing counsel agreed that the depositions of all the plaintiffs, noticed on December 15, 1981, which had been stayed pending this Court's decision on plaintiffs' motion for a protective order, remained pending. Thus plaintiffs' refusal to comply relates to the depositions noticed by defendant on December 15, 1981.

CONCLUSIONS OF LAW

1. Standing alone, the plaintiffs' failure to comply with the requirement of the April 23 Order that they confer with counsel

for the defendant in order to resolve any disputes with respect to the depositions would allow the Court to reject their contention that the depositions sought are burdensome and oppressive. The provisions of the April 23 Order moot plaintiffs' argument that the earlier deposition schedule was too intensive; and as a general matter, the Court is not persuaded that a party suffers an unreasonable burden simply because he is required to appear in his chosen forum, at least in the absence of a showing of extraordinary circumstances. Additionally, because the plaintiffs have made no showing whatever as to the existence of such a burden, the contention is clearly without merit. The Court specifically concludes that to whatever extent the depositions sought may burden plaintiffs' counsel, the requirement that the parties try to work out a mutually convenient schedule sufficiently relieves the plaintiffs and their counsel of any unwarranted burden. Thus, the Court concludes that the plaintiffs' factually unsupported argument that these depositions, in their entirety, are burdensome and oppressive is insufficient to relieve them of their obligation to make discovery in this case.

2. The parties differ sharply as to the relevance of plaintiffs' testimony concerning their conduct as it relates to the material issues of this case. At this stage of the proceedings, it would be inappropriate to make a firm determination of the issues; thus relevance in the trial sense cannot now be determined. It is clear, however, that defendant may inquire of the plaintiffs regarding the facts and circumstances which are the subject matter of this litigation in order to discover evidence or leads to evidence which may be relevant to the claim or defense of either party. Fed.R.Civ.P. 26(b)(1). The plaintiffs cannot avoid discovery by unilaterally framing issues as they would have them, and then contending that the discovery sought cannot be relevant in the discovery sense to those issues. Therefore, the Court concludes that there is no basis for relieving the plaintiffs of their duty to attend their depositions and give testimony.

3. The plaintiffs repeatedly have advised the Court that, in the event that reconsideration is denied, they will refuse to attend depositions and give testimony in this case. Plainly, this

is a deliberate decision on their part. The Court notes that the plaintiffs have been represented by able counsel throughout this case, and must assume that this decision was not made lightly, but rather was a result of a weighing of all the appropriate considerations, including the effect this decision would have on this case. The plaintiffs suggest a limited preclusion of proof as an alternative to dismissal. Based upon the whole record of this case, this Court concludes that, since it is conceivable that the discovery refused would provide the defendant with a far greater benefit, this lesser sanction is not appropriate even if the only consideration was to put the defendant in as good a position as he would have been in if the discovery were forthcoming.

4. The Court has carefully weighed the alternatives open to it at this juncture, as well as the obvious deliberateness of the plaintiffs' course of action, and the effect that this Court's action will have on other litigants in this District. Based on the record in this protracted case the Court concludes that the appropriate sanction for plaintiffs' refusal to provide deposition discovery is the dismissal of the present action. In view of the unsuitability of any lesser sanction to avoid prejudice to the defendant and with due regard to the important discovery considerations embodied in Fed.R.Civ.P. 37, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 629 (1977), this Court concludes that imposition of the sanction of dismissal provided by Rule 37 of the Federal Rules of Civil Procedure is the only course of action that is appropriate.

Therefore, it is by the Court this 14th day of May, 1982, ORDERED, ADJUDGED AND DECREED that this action be and the same hereby is dismissed with prejudice.

JOHN H. PRATT

John H. Pratt
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2025-71

BERTRAM ZWEIBON, *et al.*,

Plaintiffs,

v.

JOHN N. MITCHELL,

Defendant.

JUDGMENT

(Filed May 14, 1982)

Upon consideration of plaintiffs' refusal to permit the taking of depositions of each plaintiff, and the entire record herein, it is, by the Court, this 14th day of May, 1982,

ORDERED, ADJUDGED, and DECREED: That plaintiffs' action be, and the same hereby is, dismissed pursuant to FED. R. CIV. P. 37(b)(2)(C).

JOHN H. PRATT

John H. Pratt
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1626
September Term, 1983
Civil Action No. 71-02025

BERTRAM ZWEIBON, *et al.*
Appellants

v.

JOHN N. MITCHELL, individually and as Attorney General of the United States, *et al.*

BEFORE: Edwards, Circuit Judge; MacKinnon, Senior Circuit Judge and Swygert*, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit

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ORDER
(Filed January 9, 1984)

On consideration of the petition for rehearing of Appellants, filed December 5, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

For The Court:

GEORGE A. FISHER, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Senior Circuit Judge Swygert would grant the petition.

*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

APPENDIX D

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. A-765

BERTRAM ZWEIBON, *et al.*,
Petitioners,

v.

JOHN N. MITCHELL

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 7, 1984.

/s/ WARREN E. BURGER
Chief Justice of the United States.

Dated this 28th
day of March, 1984.

APPENDIX E

The Attorney General April 1, 1969

J. Walter Yeagley
Assistant Attorney General
Internal Security Division

Hearings on Remand of Cases Involving
Electronic Interceptions

This memorandum will first be forwarded to the Solicitor General and Mr. Will Wilson for comment.

As a result of the several opinions of the Supreme Court on March 24, 1969, a number of Criminal Division and Internal Security Division cases have been remanded to the district courts for further hearings in connection with electronic eavesdropping.

The central issue in each of these hearings will be the question of the legality or illegality of certain specific electronic eavesdropping installations most of which were at various times and for varying reasons personally authorized by the Attorney General under Presidential delegation.

In the government's petition for rehearing in the espionage case involving *Igor Ivanov,* the Solicitor General limited the request to that portion of the decision of the Court concerning disclosure of "electronic surveillance relating to the gathering of foreign intelligence information, which term we use to include the gathering of information necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage."

In Justice Stewart's concurring opinion in *Giordano* v. *United States,* he made it perfectly clear that the Supreme Court was not then deciding whether the electronic surveillances in [2] question violated the Fourth Amendment, but that this was being left as a "threshold question for the District Court to decide." He also said that the Supreme Court has "nowhere indicated that this determination cannot appropriately be made in *ex parte, in camera proceedings.*"

Deputy AG	Mr. Yeagley	Courtesy
AAG, Criminal	Mr. Maroney	
Sol. General	Mr. Davitt	

Justice Stewart went on to say that the Court has not addressed itself "to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage."

The forthcoming hearings on remand will involve disclosures relating to electronic eavesdropping on [redacted by Department of Justice] and various individuals as [redacted by Department of Justice].

Several of the surveillances could not be justified under the foregoing criteria. The question arises as to what standards we should present to the court as part of our legal discussion endeavoring to sustain the legality of our electronic surveillances. We think that we should limit the contention as to lawfulness to those installations specifically and personally approved by the Attorney General. Most, if not all, microphone surveillances were installed on the approval of the Director under a general authorization from the Attorney General and ordinarily involve trespass. Note attachment dated May 20, 1964. Many in the organized crime area were subsequently ratified by Attorney General Katzenbach. We do not believe that the illegality of these installations should be conceded although we should avoid testing their legality if at all possible at the present time by turning over the surveillance logs.

[3] This would apply to three installations in the *Ivanov* case assuming the Bureau and State Department approve. They have previously approved *in camera* inspection. It seems clear that the best installations to defend, from the standpoint of legality, are those which are aimed at gathering foreign intelligence information or information necessary for the protection of national defense secrets and installations from foreign espionage and sabotage. However, the Internal Security Division believes if we limit our criteria to those areas, we are too narrowly confined. For example, a tap placed on [redacted by Department of Justice] or a para-military organization or any other organization that seeks the violent over-

throw of the government probably could not be sustained although [redacted by Department of Justice] foreign attachment would offer an added argument in that instance.

Title 3 of the Omnibus Crime Control and Safe Streets Act of 1968, recognizes a broader authority in the President, acting through the Attorney General, to approve electronic surveillances. Section 2511 provides:

> "(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary, to protect the United States against [4] the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government . . . "

This is obviously a codification by the Congress of its view of the standards which would justify this important exception to the prohibitions against electronic eavesdropping.

Thus, we should contend that an electronic surveillance which was installed on the specific authorization of the Attorney General is a lawful installation as the Attorney General's authorization was premised on information which led him to the reasonable belief that such installation was necessary (1) "to protect the Nation against actual or potential attack or other hostile acts of a foreign power," (2) "to obtain foreign intelligence information deemed essential to the security of the United States," (3) "to protect national security information against foreign intelligence activities," (4) "to protect the United States against the overthrow of the government by force

or other unlawful means," or (5) "to protect the Nation against any other clear and present danger to the structure or existence of the government." The latter criterion, of course, must be read in a context of protecting the structure or existence of the government from change by force and violence. The foregoing are, in fact, the standards that guide the Attorney General today and which we will be defending in the future. They have been at least implicitly sanctioned by Congress. The Criminal Division and Internal Security Division believe we should adopt them for purposes of presentation of the legal issues in these limited hearings.

It should be noted, however, that some installations probably could not be justified even under the statutory criteria. This would not only include organized crime taps and mikes, but also some internal security installations such as those on [redacted by Department of Justice]. [5] [redacted by Department of Justice] and domestic organizations with no clear foreign attachment which would pose difficult First and Fourth Amendment problems. The illegality of these installations need not be conceded but all interceptions of a defendant and all such interceptions from the premises of a defendant must be turned over to the defendant or the case must be dismissed.

After the approval of a general policy as above, each case involving a security installation must be resolved on an ad hoc basis. Those involving organized crime installations present a choice of disclosure or dismissal.

[Redacted by Department of Justice.] The Internal Security Division believes it is important to get a resolution of the legal issues presented by this case as soon as possible. The *Ivanov* case would seem to offer a better test vehicle than most cases.

APPENDIX F

The Attorney General April 3, 1969

JSM:gsm

The Solicitor General

The purpose of this memorandum is to consider what action should be taken by the Department of Justice in light of the Supreme Court's decision in *Alderman* v. *United States.* No. 133, O.T. 1967, decided March 10, 1969, and *Giordano* v. *United States,* No. 28, this Term, decided March 24, 1969, and *Taglianetti* v. *United States,* No. 446, this Term, decided March 24, 1969. This question has two parts (1) what action should the government take in those cases presently pending in which we have disclosed the fact that the defendant has been overheard during the course of an electronic surveillance and (2) what action should we take now and in the future with regard to the disclosure of the fact that a defendant or his premises were subject to electronic surveillance. With regard to each of these issues, I shall endeavor to set forth some of the possible alternative courses of action and then indicate the course that I think appropriate.

1. *Cases in which some disclosure has already* [*illegible*] [redacted by Department of Justice].

[2] A. *Cases where we do not contend that the surveillance was lawful.*

[Pages 2-4 redacted by Department of Justice.]

[5] B. *Alternative to disclosure where the surveillance was illegal.*

[Page 5 redacted by Department of Justice.]

[6] C. *Procedure where we claim that the disclosed surveillance was legal.*

The opinion of the court in *Alderman,* as clarified in *Giordano* and *Taglianetti* provides that the district court must determine whether the surveillance at issue was lawful. The Court specifically noted in *Giordano* that "a finding by the

district court that the surveillance was lawful would make disclosure and further proceedings unnecessary." Thus, in those cases where the surveillance was authorized by the Attorney General in the interest of national security, we can contend in the district court that the surveillance was legal (see *Katz* v. *United States* 389 U.S. 347, 362-364 (White, J. concurring)) and that the defendant is not entitled to any disclosure.

The Court's opinion in *Taglianetti* makes clear that *Alderman* does not require "an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance," and Justice Stewart's concurring opinion in *Giordano* strongly suggests that the question of the legality of a surveillance may be determined on the basis of an *in camera* presentation of the facts to the district judge. Thus, if we were able to establish that the surveillance was legal on an *in camera* presentation of the facts to the district judge, we would not have to make any damaging disclosure to the defendant.

[7] We must consider, however, whether we want to press the courts to decide whether the President acting through the Attorney General has the constitutional power to authorize wiretapping and eavesdropping without a warrant in order to protect the national security. As matters stand now we can always defend such actions on the ground that it is lawful. If, however, the courts decide the issue against us, the President will be faced with the choice of discontinuing all such surveillances or continuing to authorize action which the courts have declared unconstitutional. If we do not litigate the issue of legality, we could justify a policy of not disclosing such surveillances to a defendant in future cases on the ground that we believe that only illegal surveillances should be disclosed. Thus, we *might* be able to avoid this problem in future cases.

I am persuaded, however, that we should litigate the question of the legality of such surveillances in the present cases. I do not believe the problem will go away. Even if we change our voluntary disclosure policy, defense counsel can still make motions to require us to disclose whether or not the defendant was overheard during *any* electronic surveillance. If such a motion were made, I think that the Court would not let

us hide behind a claim that it was our opinion that any surveillance that did occur was legal. Therefore, I believe that we may as well litigate the question of the legality of national security surveillances in the pending cases.

If we determine to litigate this question, we must decide on the precise situations in which we wish to contend that the President has power to authorize electronic surveillance to protect the national security. It could [8] be argued that such power extends to the protection of the national security from internal subversion and, thus, the Attorney General could, without court order, constitutionally authorize electronic surveillance of the [redacted by Department of Justice] or other subversive organizations or any officers or members of such organization. I believe, however, that any attempt to sustain such surveillances would be disastrous. Not only would we not prevail on the particular facts presented but I believe we would get a broad ruling that all electronic surveillance is unconstitutional if conducted without a warrant.

In our petition for rehearing in *Ivanov* we limited our submission that the Attorney General could constitutionally authorize electronic surveillance to those situations where the purpose of the surveillance was to gather information necessary for the conduct of international affairs and for the protection of national defense secrets and installations from foreign espionage or sabotage. I would similarly limit our submission to the district courts on remand. Not only is such an approach more likely to be successful, but our need to isolate the surveillances from disclosure is the strongest in this area. Although the disclosure of the wiretapping or bugging of a domestic subversive organization might be embarrassing, we could not possibly disclose the location of our foreign intelligence surveillances. Moreover, to the extent that there is evidence that a domestic organization is engaged in serious criminal activity we could get a warrant under the Crime Control Act, but the Act does not provide the machinery for a warrant for a foreign intelligence surveillance. Thus, I strongly urge that we claim legality only for those surveillances expressly authorized by the Attorney General to gather foreign intelligence information and to

protect national defense installations and secrets from foreign espionage and sabotage.

[9] If we do seek to sustain the legality of such surveillances in the district courts, I strongly urge that these cases be uniformly handled and carefully presented. As we noted in our brief in *Ivanov,* in attempting to litigate such a question a problem arises because we cannot reveal to the defendant all of the facts concerning the surveillance. Thus, there is a problem of providing a procedure that will meet the standards of "due process" but yet withholds from the defense that information which cannot be disclosed. I would suggest that we adopt the following procedure:

An affidavit of the Attorney General should be filed with the district court and a copy given to defense counsel. The affidavit would state (1) that the defendant was overheard in the course of a surveillance which was not directed at him but was being conducted solely to gather foreign intelligence information, and give the approximate date of the overhearing; (2) that records of the Department of Justice establish that the surveillance was instituted at the express personal direction of the Attorney General and that a copy of the authorization is being submitted to the court for its in camera examination; (3) that it would prejudice the national interest to disclose any additional facts concerning the surveillance to the defendant; and (4) that a copy of the record of the surveillance, together with the relevant facts as to time and place, is being submitted to the court for its *in camera* examination so that the court can satisfy itself that the purpose of the surveillance was to gather foreign intelligence information.

I believe that this procedure will give the defense an adequate factual basis on which to argue the legal question concerning the Attorney General's constitutional power to authorize such a surveillance while protecting the government's interest in nondisclosure.

[10] 2. *Possible changes in disclosure policy in future cases.*

[Pages 10-12 redacted by Department of Justice.]

APPENDIX G

April 7, 1969

MEMORANDUM FOR THE ATTORNEY GENERAL

RE: Hearings on remand of cases involving electronic interceptions

On April 3, 1969, I sent you a memorandum in which I undertook to summarize the results of the decisions of the Supreme Court in this field, including the recent decisions of the Court in *Ivanov* v. *United States, Giordano* v. *United States,* and *Taglianetti* v. *United States.* In addition, I undertook to raise and discuss some of the policy questions which remain in this area.

At about the time my memorandum was completed, I received a copy of the memorandum which Assistant Attorney General J. Walter Yeagley addressed to you on April 1, discussing the policy to be followed in cases of this sort in the future.

This memorandum is addressed to the suggestions contained in Mr. Yeagley's memorandum. I find myself in disagreement with some of his proposals regarding the instances in which we should contend that electronic surveillance authorized by the Attorney General is legal. Accordingly, I am writing this memorandum to set forth my views, with specific reference to Mr. Yeagley's suggestions. I am sending copies of this memorandum to Mr. Yeagley, Mr. Wilson, and to the Deputy Attorney General.

As I noted in my earlier memorandum to you, in our petition for rehearing in *Ivanov* we limited our submission that the Attorney General could constitutionally authorize electronic surveillance without [2] a warrant to those instances where the purpose of the surveillance was to gather information necessary for the conduct of international affairs and for the protection of national defense installations and secrets from foreign espionage and sabotage.

Mr. Yeagley would have us broaden our claim of legality to embrace two other purposes: (1) "to protect the United States against the overthrow of the government by force or

other unlawful means," and (2) "to protect the Nation against any other clear and present danger to the structure or existence of the government."

While it is true that in the Crime Control Act Congress indicated that the President acting through the Attorney General might have the power to authorize electronic surveillance for these purposes, I do not think the courts, particularly the Supreme Court, would sustain such a power. Moreover, if we attempt to sustain the power of the Attorney General to authorize electronic surveillance for purely domestic purposes, we will, in my view, prejudice our efforts to sustain the legality of electronic surveillance directed at the activities of foreign powers. Thus, as a matter of litigation strategy, it is my opinion it would be unwise for us to seek to sustain the validity of electronic surveillance directed at the [redacted by Department of Justice] or other domestic individuals or organizations.

The Supreme Court has for the past several years, and with virtual unanimity, manifested great hostility to laws attempting to limit the rights of Communists and others suspected of engaging in subversive activities. During the last four years, we have lost every internal security case we have had in the Supreme Court. See *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70; *Gojack* v. *United States,* 384 U.S. 702; *Dennis* v. *United States,* 384 U.S. 355; *United States* v. *Laub,* 385 U.S. 475; *Treuis* v. *United States,* 385 U.S. 491, *United States* v. *Robel,* 389 U.S. [3] 258; *Schneider* v. *Smith,* 390 U.S. 17. See also, *Brown* v. *United States,* 381 U.S. 437. It is significant that the Government not only lost these seven cases, but all of them were without dissent, except for two dissenting votes in one case, and two partial dissents in another. Thus, the Government was able to muster only four votes out of close to sixty in these seven cases.

While many of these cases were decided on narrow grounds, the fact that the Supreme Court ruled so firmly against us in all of them clearly supports the conclusion that the Court views with suspicion laws aimed at those suspected of subversive activities. Indeed, in *Robel* and *Schneider,* the Court struck down programs designed to preclude Communists from em-

ployment in defense facilities and in the merchant marine. The reasoning of the court in *Robel* is most significant. The Court said (389 U.S. at 264):

> "the Government asserts that [the statute making it a crime for a Communist to be employed in a defense facility] is an expression 'of the growing concern shown by the executive and legislative branches of government over the risks of internal subversion in plants on which the national defense depend[s].' Yet this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideas which set this Nation apart. For almost two centuries our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.

[4] I find little reason to doubt that the Court would react similarly if we attempted to argue that it is necessary, without a warrant, to eavesdrop on the conversations of Communists or others suspected of subversive activities in order to protect the "national security." This would be particularly true now, since, under section 2516 of the Crime Control Act, we can get an eavesdrop warrant if we have probable cause to believe that the eavesdrop may provide evidence of treason, espionage or crimes relating to riots.

While it is never possible to predict with 100% accuracy what the Supreme Court will do in a future case, my thought is that Justice Stewart's concurring opinion in *Giordano* can well serve as a guide in our future actions. After pointing out that

the question of legality was still open for decision in the district court, Justice Stewart noted:

> "The Court has not in any of these cases addressed itself to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage.

Under all the circumstances, it seems to me unlikely that Justice Stewart would have written this concurrence unless he felt that a majority of the Court would uphold such conduct. It is significant, too, that he adopted the precise notion of "foreign intelligence" which we had suggested in *Ivanov* rather than the broad concept of "national security" referred to in the concurring opinion of Justice White in *Katz* v. *United States,* 389 U.S. 347, 362-364.

In this regard, reference may also be made to the concurring opinion of Justice Douglas, joined by [5] Justice Brennan, in *Katz,* 389 U.S. at 359-360. This rejects the idea that the President acting through the Attorney General can authorize eavesdropping in "national security" cases, and is based in large part on the idea that, since the President and Attorney General "may even be the intended victim of subversive action," they would not be as neutral as a magistrate. That reasoning would not apply, however, to surveillances designed to gather "foreign intelligence information."

Thus, I think our chances of success are much greater if we limit our submission that the Attorney General can constitutionally authorize electronic surveillance to those instances where the surveillance is designed to gather foreign intelligence information. In fact, I think that we should limit our attempt to sustain the legality of such surveillance to instances involving the surveillance of a foreign establishment.

I agree with Mr. Yeagley that there is no reason for us to concede that only foreign intelligence surveillances may be constitutionally authorized by the Attorney General. My point

is, rather, that we should, for the present, at least litigate the legality issue only in cases involving foreign intelligence surveillances conducted at foreign establishments.

In our original briefs in *Alderman* and *Ivanov* we tried to protect from unnecessary disclosure any electronic surveillances conducted by the government. The result of this effort to protect ourselves on all fronts was the opinion of the Court in *Alderman* which, until the clarification in *Giordano* and *Taglianetti,* could be construed as requiring us to disclose all surveillances. With the benefit of handsight, it might have been better had we originally limited our submission in *Alderman* to the question of "standing," and in *Ivanov* to the position we ended up with in the petition for rehearing in *Ivanov*.

Fortunately, Justice Stewart's concurring opinion in *Giordano* gives us some hope that we may yet prevail with regard to foreign intelligance surveillances. Nevertheless, we are now faced with a last ditch fight [6] to protect our right not to disclose the facts concerning foreign intelligence operations. In this situation, it is not wise, in my view, for us to try at this time to win for ourselves the greatest possible protection. Rather, we should decide what ground we have a chance to hold, and then make every effort to secure approval of that position.

Obviously, it is highly desirable that we not be placed in a position where we are forced to disclose foreign intelligence surveillances. It is not as necessary that we preclude disclosure of surveillances directed at domestic subversive activities. This is for two reasons: (1) the embarrassment attendant upon disclosure of domestic surveillances is not comparable to that which would result if we were forced to disclose foreign intelligence surveillances; (2) If a domestic organization is engaged in a criminal conspiracy, we can obtain a warrant to authorize eavesdropping under the Crime Control Act, but there is no procedure under the Act to get a warrant to eavesdrop for foreign intelligence purposes.

Thus, my recommendation is that we litigate the question of the Attorney General's power to authorize electronic surveillance only in those cases where the surveillance was conducted at a foreign establishment in order to gather foreign intelligence information or to protect defense secrets and installations from foreign espionage and sabotage.

Erwin N. Griswold
Solicitor General

cc: Deputy Attorney General
Mr. Yeagley—Internal Security
Mr. Wilson—Criminal
Mr. Martin—SG's staff

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. KC-CR-1204

UNITED STATES OF AMERICA,
Plaintiff,

vs

FELIX LINDSEY O'NEAL
a/k/a PETE O'NEAL,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances:
HON. ARTHUR J. STANLEY, JR.,
Chief Judge, Presiding.

* * * *

THE COURT: We will be on the record in Case No. KC-CR-1204, United States, vs. Felix Lindsey O'Neal. I understand that counsel had some matter to take up with the Court and I want to take this opportunity, first, because this might be of some significance to counsel in the voir-dire examination, the defendant's motion to require the government to elect between Counts 1 and 3 will be denied since the evidence required to establish the one count, the charge in the one count, would differ from that to be charged in the other.

I have examined in camera the logs of the telephone, intercepted telephone conversations, and I find that all of the interceptions were after the effective date of the Crime Control Act and all were after the date of January 16, 1969, the date the offense is alleged to have been committed and that none of them have any significance with respect to the offenses charged in the three counts in this case and that all were authorized by the President acting through the Attorney General. The case of Alderman versus United States, 394 U.S. 165, has to do with

disclosure to the defense of intercepted communications illegally obtained or to hold here and rule that all of the interceptions, the wire taps, in this case, those logs of which were submitted to the Court for in-camera examination, were legally obtained within the inherent constitutional powers of the President because of his responsibility to gather intelligence information having to do with matters vital to national security and in connection with that, I cite the case of United States versus Clay, Fifth Circuit, not yet published, so far as I know, an opinion handed down July 6, 1970, and United States versus O'Baugh, a decision of the District Court of the District of Columbia, I think not published, case in that court numbered CR-1529-67, the decision being dated September 30, 1969. So the logs of the interceptions will be sealed by the Court and returned to the Attorney General where in the words of Attorney General Mitchell's affidavit, they will be retained under seal so they may be submitted to any appellate court that may review this matter.